Supreme Court, U. S.
FILED
JUL 27 1979
MICHAEL RODAK, JR., CLE

In the Supreme Court

of the United States

79-197

——— Term, 1979

STAN SKOKO, RALPH GROENER and ROBERT SCHUMACHER, Board of County Commissioners, on behalf of CLACKAMAS COUNTY, OREGON, a Political Subdivision of the State of Oregon,

Petitioners,

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR OF THE UNITED STATES, and W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY OF THE UNITED STATES,

Respondents,

and

JEANETTE SIMERVILLE, LARRY CALLAHAN and DALE D. SCHROCK, Board of County Commissioners, on behalf of BENTON COUNTY, OREGON, et al,

Intervenor-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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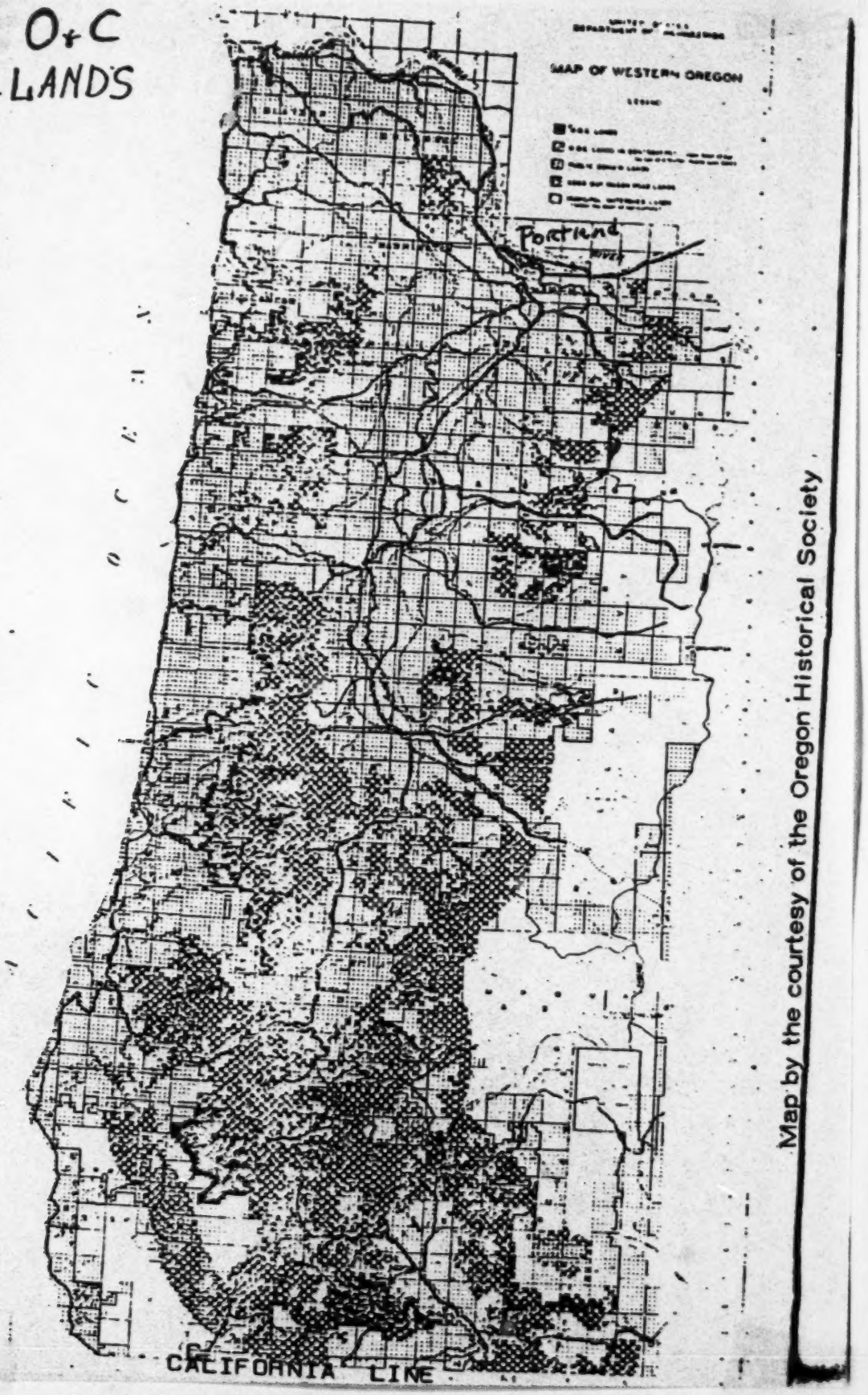

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CECIL D. ANDRUS, SECRETARY OF THE INTERIOR OF THE UNITED STATES, and W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY OF THE UNITED STATES,

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Intervenor-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on March 9, 1979, and Rehearing in banc denied May 1, 1979.

OPINION BELOW

The opinion of the Court of Appeals is being reported. (App. A, p. 23). The opinion of the United States District Court of Oregon is not reported (App. B, p. 34).

JURISDICTION

The Judgment of the Court of Appeals was entered on March 9, 1979. Rehearing denied May 1, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). (App. C, p. 35).

Also the Mandamus Statute compelling the Secretaries to comply with Title II of the McNary Act, 50 Stat. 874 (1937); Mandamus Statute 28 U.S.C. §1361. (App. C, p. 35). Complaint prayer is $182,000,000.00.

Jurisdiction founded on the existence of federal questions:

1. The grants and covenants contained in original Granting Acts:

July 25, 1866	*14 Stat. 239*
June 25, 1868	*15 Stat. 80*
April 10, 1869	*16 Stat. 49*, and
May 4, 1870	*16 Stat. 94*

See App. D, p. 38.

2. Failure of the lower court to comply with O&C Railroad v. United States, 238 U.S. 393.

3. Failure of the lower court to recognize the basic fundamentals of Oregon State sovereignty required under the Admission Act of 1859, 11 Stat. 383. (See App. C, p. 35).

4. Failure to acknowledge or recognize the principle of the United States Constitution, Article IV, §§ 3 and 4.

5. Failure to recognize the basic and unique features of the United States Constitution of dual sovereignty.

QUESTIONS PRESENTED

Technically this case represents a question of statutory construction — What effect does an annual appropriation bill have on the substantive McNary Act? Fundamentally, however, more basic questions of the federal-state relationship have to be considered.

1. Can the Federal Government, merely by an Act of Congress, retake land from a state that was once subject to state sovereignty?

2. The Ninth Circuit Court of Appeals failed to follow the former decision of the United States Supreme Court, 238 U.S. 393, that firmly enunciated, at p. 434, that absolute title was in the O&C Railroad Co., hence, subject to Oregon's sovereignty.

3. The court erred in allowing appropriation bills to amend substantive legislation (McNary Act 50 stat. 874) by implication, violating the rule of Langston v. U.S., 118 U.S. 389.

5. The court failed to recognize the fundamental doctrine of dual sovereignty of the United States Constitution, and erred by failing to apply the following fundamentals:

(1) The equal footing doctrine of the sister states;

(2) Just as a state cannot impair a federal function, neither can the Federal Government offend and usurp state sovereignty.

6. The court erred in allowing the Secretary of Interior and Secretary of Treasury to circumvent the McNary Act which requires the Federal Government to use the fourth 25% of timber revenues from the O&C lands to administer the lands. The Federal Government is in serious violation of paragraph C, Title II, by ignoring its responsibility and not using the specific percentage as required.

7. The court erred in stating that the O&C lands became part of the public domain.

STATUTES INVOLVED

Chamberlain-Ferris Act of 1916, 39 Stat. 218. (App. I, p. 52).

McNary Act of 1937, 50 Stat. 874. (App. H, p. 45).

Land Grant Acts (1866-70). (App. D, p. 38).

14 Stat. 239.

16 Stat. 49.

16 Stat. 94.

28 U.S.C.A. 1361. (App. C, p. 35).

28 U.S.C.A. 1254 (1). (App. C, p. 35).

Annual Appropriation Bills. (App. E, p. 40).

Oregon Admission Act, 11 Stat. 383. (App. C, p. 35).

FORMER OPINIONS INVOLVED

Supreme Court Opinion, Oregon & California Railroad Co. v. United States, 238 U.S. 393, 35 S. Ct. 905, 59 L. Ed. 1360 (1915).

Clackamas County v. McKay et al, 219 F.2d 479 (C.A. D.C., 1954).

STATEMENT OF THE CASE

Petitioners seek a Writ of Mandamus compelling the Secretaries of Interior and the Treasury to comply with the McNary Act, supra.

This case involves two and one-half million acres of prime timber land in the Western half of Oregon. They are known as the Oregon-California Land Grant Lands and will be referred to as the "O&C" lands. All these lands are situated in Oregon.

Petitioners are duly elected County Commissioners of Clackamas County, Oregon and reperesent said county, a subdivision of the State of Oregon. Petitioners, for Clackamas County and 17 other Western Counties, seek by Mandamus the proper distribution of a special and unique fund created by statute. The Secretaries have been dividing this fund 50-50 — when the statute requires a 75-25 distribution subject to the proper construction of annual appropriation bills. There is not one penny's discretion and the Secretaries are wrongfully construing statutes and ignoring a prior decision of this Court and many historical and legal milestones along the way.

To review the important history of the matter, during the Civil War, our national leaders recognized how unguarded our western flank was and how vulnerable we were to enemy attack. Consequently, in 1866, Congress, being aware of this problem, and wanting a railroad from Portland to connect with the transcontinental line that was completed (Central Pacific and Union Pacific), and glamorized by the pounding of the golden spike connecting the two lines at Promontory, Utah, made a substantial land grant to the Oregon & California Railroad Co.

The Central Pacific's most advantageous connecting point with the new railroad to be built northward was at Roseville, California. Congress knew that to defend and develop a new territory, it needed settlers and also needed transportation and communication. Consequently, in 1866, legislation was passed granting and conveying to two railroad companies, millions of acres to stimulate and promote the construction of a proposed new railroad that would assist in developing Northern California, Oregon and, eventually, the State of Washington.

The United States, in granting statehood to California and Oregon, withheld the majority of the land for future granting to settlers by homestead and other means. In Oregon, the Admission Act of 1859 granted Oregon every 16th and 36th section for school purposes and additional land for a State capitol and also salt springs. The rest was retained in ownership by the United States. (The Admission Act provided that Oregon was to be admitted on equal footing with her

sister states. Query: How is Oregon admitted on equal footing if the United States still retains 52% of the land?) (App. C, p. 35).

Going forward with the O&C history, in 1866, Congress granted four million acres to the Oregon & California Railroad. The railroad company receiving the grant had to be designated by the State legislature. The purpose of the particular grant was to have the railroad and telegraph lines constructed *from Portland to the California line.* During the same period, Congress granted a large quantity of land to the second railroad company, the California & Oregon Railroad Co., and its responsibility, under the same conditions, was to build the railroad and telegraph lines *from Roseville to the Oregon border.* Years later, after the railroad was completed, the two lines became the Southern Pacific Railroad.

There is rich history in the manipulation by railroad pioneers and developers and shocking and surprising historical revelations of the land frauds that resulted in many prominent persons and public officials being indicted. Our purpose here is to stay on the main line and to point out events that corroborate, without a shadow of a doubt, that the 18 O&C counties have a vested interest in the O&C lands. We will try to stay away from the spur lines that have fascinating history but do not assist in the quick threading of our way from 1866 to 1979 that substantiates our claim that Oregon has a vested interest in these O&C lands and that the 18 O&C counties are entitled to 75% of the annual gross revenues from timber sales off these lands.

The original Granting Acts had two purposes. (1) To settle the Oregon country and (2) to assist in building the railroad. Both were mutually dependent upon the success of the other. Granting every odd section of land to the Oregon & California Railroad gave that railroad the right-of-way for the railroad and also the right-of-way for the telepgraph line. The huge amount remaining was to be sold to actual settlers in parcels not to exceed 160 acres at a price not to exceed $2.50 per acre. Parenthetically, it should be told that prior to the Granting Acts, the land was being sold for $1.25 per acre. Upon the passage of the Granting Acts, the even sections were increased to $2.50 per acre. The end result is easy to see. Namely, the government did not lose because the settlers purchasing the even numbered sections picked up the tab for the odd sections the government gave and granted to the Oregon & California Railroad.

The grant included all of the odd sections in an area 20 miles on both sides of the railroad line. There had to be an adjustment, however, because by the time of the grant, some of the odd sections had already been taken up so the government created an indemnity strip 10 miles additionally on both sides to make up for the odd sections that the railroad was entitled to have. The result is that the O&C lands are included in a 60-mile wide swath from Portland to the California line, thirty miles on each side of the track and being situated in 18 of Oregon's 36 counties.

The grant was accepted by the Oregon & California Railroad and the line was built. The land was being

sold to actual settlers in accordance with the terms of the grant. After awhile, the situation changed. Of the four million acres, much of it was on hillsides and ravines, not suitable for agriculture. The railroad strayed away from the original conditions of the grant and started selling large parcels for sums far exceeding the $2.50 per acre.

Around the turn of the century, the railroad adopted the policy of flatly refusing to sell to the settlers. A lawsuit resulted between the settlers and the railroad and the United States Government intervened. The results of the litigation are as follows.

The U. S. District Court in Portland held that the railroad had violated the condition subsequent by refusing to sell land under the terms of the grant and that the unsold portion of the grant (approximately 2.5 million acres) reverted to the United States Government. *United States v. Oregon & California Railroad Co.*, 186 F. 861 (Or. 1912).

The United States Supreme Court reversed the lower court's decision and said, "No, there was no condition subsequent but the railroad had violated an enforceable covenant." The court gave Congress six months to work out a reasonable solution. *Oregon & California Railroad Co.* v. *United States*, 238 U.S. 393 (1915).

In 1916, Congress passed the Chamberlain-Ferris Act and revested the land to the United States with a formula of selling the land to settlers and the dis-

tribution of the moneys from the sale of the land or of any timber thereon.

In essence, what occurred was that the government was carrying out the terms of the original grant which the railroad had violated and had refused to do. Also, it should be noted that revestment to the United States Government would be actually the same as reverting in defiance of the United States Supreme Court decision unless revestment was for the purpose of carrying out the terms of the 1866 grant and not placing the land back in the public domain. If it were the latter, it would be completely in defiance of the Supreme Court decision of 1915, supra.

Some of the land was sold but in the ensuing 21 years, from 1916 to 1937, it became crystal clear that much land would never be suitable for agricultural purposes and also with the demand for timber, it became readily apparent that there was a great need for a permanent shoring up of the forest lands so that there would be a program of sustained yield for the betterment of the local communities and also for the nation.

Based upon this recognition of the circumstances, the Congress passed the McNary Act in 1937. It is extremely important to realize at this juncture that the McNary Act allowed the government to do exactly what the railroad had done. That is to refuse to sell to settlers because the McNary Act said that the land would be held permanently as forest lands.

The motive of the government was different from

the railroad but the end result, as far as getting the land into private hands and eventually getting it on the tax rolls, was the same.

At that time, the Congress, recognizing the inequities of the situation and that it was completely changing the policy of the Granting Acts and not carrying out the purposes as originally intended, made unique and completely different provisions for the 18 Oregon counties. Uniqueness was required because these lands had unconditionally left the public domain lands.

See excerpts from hearings, 75th Congress, Committee on Public Lands re H.R. 5858 April 13, 1937. (App. F, p. 42).

From the ordinary public domain lands, the government received 75% of the income and the local communities received only 25% in lieu of taxes but since the O&C lands were intended to be for private parties, consequently on the tax rolls, the Congress recognized that it had a solemn duty to make a unique disposition of the problem. Therefore, Title II of the McNary Act provides that 75% of the proceeds go to the 18 counties and 25% to the United States Government for administration of the lands. There was a period when the third 25% would go to the United States Government to reimburse it for moneys it had expended on the O&C lands. (App. G&H, pp. 44-45).

It should also be noted that the O&C lands have never cost the federal government any money. The

lands have always paid their way. In 1952, the formula worked under the McNary Act and the counties received 75% of the proceeds from the sale of timber and 25% went to the United States Government for administration.

Commencing in 1953, improper negotiations between the Association of O&C Counties, an unofficial body, and the Congressional committees resulted in the compromise that there would be a 50/50 split. To carry out that improper compromise, Congress attached a rider to the appropriation bills appropriating silently the third 25% and making that a reimbursable item under the McNary Act.

It should also be noted here that the government had a solemn duty to spend the fourth 25% on administration and this it has not done. Since 1953, the government has covered into the General Fund of the United States the sum of $182,000,000.00 out of its fourth 25%. The law required that before they could cover this into the General Fund, it had to set it off against any reimbursable items that were charged against the third 25%. The silent appropriation bills, over a 20-year period, had made many millions a reimbursable item against the counties' third 25%. The law requires any excess of the fourth 25% to be charged against any reimbursable items that were a lien against the third 25%. This the government did not do. (See breakdown App. G, p. 44).

In other words, what the government is doing, by its own discretion, without any yardstick from Con-

gress, is deciding how much of the fourth 25% it wants to spend on administration, then takes the whole third 25% and put in any excess of the fourth 25% that it did not choose to use into the General Fund. This is absolutely improper in accordance with the formula of the McNary Act. (See Title II, McNary Act of 1937, App. H, p. 45).

However, it should be noted that Clackamas county's contentions are that one, Oregon has a vested interest in these lands and two, that the formula of 75%-25% should be carried out gain strength and are corroborated in many ways.

First, as to vested interest, the Revestment Act is the only reconveyance of land that the government has. The Revestment Act was not to put the land back in the public domain but to carry out the terms of the original grant. Therefore, the McNary Act gave the government no stronger right to the land other than what could come about under the Chamberlain-Ferris Act. In passing the McNary Act, the Oregon officials consenting and not objecting, and recognizing the uniqueness of the situation, relied on the fact that the formula would be carried out. The McNary Act, on many occasions, refers to the dependence of the Oregon counties on these forest lands. Therefore, it was clear that this was a unique and solemn responsibility that the government had to these 18 Oregon counties.

So the government now contends that it has plenary power over the Oregon land just as if they were public domain lands. This is completely illegal and

arbitrary. Some acts of Congress have a higher solemnity and go beyond being amended, repealed or modified by any future Congress. It is obvious that the Granting Acts and the Admission Act of Oregon to the Union cannot be repealed. The O&C legislation is in that same category. It has the sanctity of a contract between the two governments. For the federal government now to come along and claim plenary powers is to defeat the entire original purpose of the Granting Acts of 1866, the Chamberlain-Ferris Act and the McNary Act. (C-F Revestment Act).

SUMMARY FOR REASONS GRANTING WRIT

Because of the long history and the difficulty of reducing 113 years of legal history to a manageable size an effort will be made to concisely state in summary the basis why the Writ should be granted.

1. The McNary Act is the existing substantive law.

2. Congress has by annually appropriation bills amended the Act just for that one year.

3. The amendments, however, are limited to their express language.

4. The McNary Act in par. C of Title II sets forth the machinery in the event there is a surplus in the 4th 25% that is to be used for administration. (App. G&H, pp. 44-45).

5. That machinery is not being followed, namely: the Act requires any surplus to be charged against

any reimbursable item and the annual appropriation bills are such an item.

6. The Secretaries are covering the surplus into the general fund instead of reducing the reimbursable item. The proper procedure would leave most of the 3rd 25% available to the Counties as the Act provides.

7. The ordinary rules of statutory construction will support Clackamas County.

8. The historical and legal past corroborates this position.

9. The U.S. by passage of time is attempting to enlarge its trusteeship to absolute ownership.

10. Substantive legislation with such a dramatic past has to be read in the light of the principles of constitutional government that makes our system of the UNION sacred and cannot be whittled away by the erroneous construction of appropriation bills. (App. E, p. 40).

REASONS FOR GRANTING WRIT

This case is unique and extremely important to the people of Oregon. The issue is whether the doctrine of dual sovereignty still exists. To leave it go unattended would result in a negative decision for Oregon and have the practical effect of reducing Oregon's equal status among her Sister States.

A. Conflict with this Court's opinion in 238 U.S. 393 (O&C R.R. Co. v. U.S., 1915) which clearly pronounced its decree that title to the O&C lands was

absolute in the O&C R.R. Co. Absolute title in a private party causes state sovereignty to attach and it cannot be taken away by an Act of Congress, and certainly not by implication through appropriation bills.

This question is dramatically unique when the history is fully understood. In 1915 the U.S. Supreme Court had reversed 186 F. 861 (Ore.-1912). The lower court had held that the remaining 2.5 million acres of the original land reverted to the United States because the O&C R.R. had refused to sell to settlers — hence had violated a condition subsequent — consequently the land reverted. This court, in 238 U.S. 393, reversed, and said "No." There was no condition subsequent and absolute title was in the O&C R.R. Co. p. 434). App. V, p. 87).

Right here we find some unique judicial history. The court in the above decree provided for Congress to pass legislation that would force the O&C R.R. to sell to settlers, or if Congress refused, then the U.S. District Court in Portland would provide the answer.

Consequently, when Congress passed the Chamberlain-Ferris Act. 39 Stat. 218 (1916) it was pursuant to the court's decree and not legislation initiated on its own.

The Congress then nor now could defy that court order. The Ninth Circuit opinion defies that Order because it in essence assumes the proposition that the lands reverted to the U.S. when the Court's 1915 Order stated just the opposite.

B. Oregon's Status in the Union on Equal Footing is challenged by the Ninth Circuit Opinion.

Not often does a case bring into focus such a constitutional fundamental of such importance.

One of the unique features of our constitutional system is the principle of dual sovereignty. The equal footing doctrine under no circumstances allows Congress to retake land that is subject to state sovereignty merely by an Act of Congress. The federal government is sovereign within its sphere and likewise a state is sovereign in its sphere.

C. Ninth Circuit's opinion offends the basic doctrine of McCulloch v. Maryland supra and its decision is in conflict with that landmark case.

The rationale of McCulloch v. Maryland is that a state cannot impair a delegated function of the U.S. That case also holds for the converse of that doctrine, namely, the federal government cannot invade the state's sphere of action and nothing is more sacred and basic to that state than having sovereignty over its own territory, subject to federal sovereignty over any function that is federal in nature.

D. The Ninth Circuit erred in statutory construction by allowing a silent appropriation bill to amend substantive legislation, McNary Act, Title II, 1937, supra. (App. G&H, pp. 44-45).

Its ruling repudiates the long standing doctrine of Langston v. U.S. 118 U.S. 389.

The Secretaries are erroneously taking an additional 25% that they are not entitled to.

E. Timber revenues denied by Ninth Circuit ruling are economic lifeline of the 18 counties.

F. The Ninth Circuit's ruling perpetuates an atmosphere of fear between Oregon and the federal government.

ELEMENTS OF CONTRACT INVOLVED

The Supreme Court, in O&C RR. v. U.S., 238 U.S. 393, emphasized that the land did not revert, but there was an enforceable covenant to sell land to the settlers. Therefore, the court recognizes that there was contractual relationships between the railroad and the federal government. Those elements of contract have not changed. Since the railroad had been remiss in their contractual duties the federal government acted as the enforcer of the covenants under the Chamberlain-Ferris Act, supra. When the policy of the granting acts was changed because of sustained yield in the McNary Act, supra, the elements of contract follow between the U.S. and Oregon. The new policy and the Congress, recognizing Oregon's unique status in the O&C lands, namely, state sovereignty, the McNary Act then becomes unique legislation that has the elements of contract that cannot just be repealed by silent appropriation bills.

FEDERAL GOVERNMENT VIOLATES THE POLICY OF THE McNARY ACT

The policy of the McNary Act had two main purposes; (1) sustained yield, and (2) the unique dependence of the local communities upon the timber lands. The Act envisioned that the 75-25% split was a fair one — 75% to the 18 counties, and 25% for administration. Now, the Secretaries are not spending the fourth 25% on administration, except for a very nominal sum, and are using the third 25% and by such conduct are emasculating the policy and purpose of the McNary Act. There are no express terms of the appropriation bills that allow them to make such a division of the gross revenues. (App. G, p. 44).

OREGON WANTS TO MAINTAIN FIRST CLASS STATEHOOD

If the government's position is substantiated, Oregon has been reduced to second class Statehood. Why should the Oregon delegation to Congress have to go there with hat in hand to beg for what is rightfully ours or to remain quiet so we don't "rock the boat" and cause our national leaders to become upset with us. Both are degrading and contrary to the law.

CASE SUBMITTED FOR FINAL DETERMINATION

The defendant Secretaries moved for Summary Judgment and all parties stipulated before the court that the case was submitted for final determination. This case should be determined on the substance of the issue by this Court. Judicial economy would be served by this Court making a determination on substance. It

is all in the record. Romeo v. Internat'l. Termination Co., 358 U.S. 354, 357; Smith v. Govt. of Virgin Islands, 329 F.2d 135.

MATTERS OF HISTORY AND PUBLIC CONCERN

The magnitude of this historical issue is one that should be decided by this court as it involves a great question of federal and state relationship.

1. Excerpts from Hearings on the Committee on Public Lands. (App. F, p. 42).

2. Senate Joint Memorial No. 6 Oregon Legislature 1951. (App. J, p. 55).

3. Editorial of Oregon Journal, Portland, Oregon 1/20/52. (App. K, p. 57).

4. Editorial Oregon Journal "It's Our money" 1/51. (App. L, p. 63).

5. Letters to editor The OREGONIAN, Portland, (App. M, p. 68).

6. Statement of Guy Cordon, later U.S. Senator, Committee on Public Lands. (App. N, p. 72).

7. Colloquy between Senator Guy Cordon and Senator Ellender; Cubcommittee of the Senate on Appropriations on HR 7176. 82nd Cong. 2nd Sess. 1952. p. 1543. (App. O, p. 74).

8. Editorials and Letters (App. R to U, pp. 80-86).

Oregon desperately wants to be an equal state in the UNION. This Court's attention is our last hope for that status.

CONCLUSION

The Ninth Circuit erred in statutory construction of the McNary Act as amended by the silent appropriation bills.

The relief of mandamus should be allowed and the proper distribution of the O&C Funds should be ordered requiring the two Secretaries to make the accrued payments to the 18 O&C counties.

Petition should be granted.

Respectfully submitted

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APPENDIX A

United States

COURT OF APPEALS

for the Ninth Circuit

STAN SKOKO, et al, on behalf of CLACKAMAS COUNTY, OREGON, *Plaintiffs-Appellants,* vs. CECIL D. ANDRUS, Secretary of the Interior, et al, *Defendants-Appellees,* and JEANETTE SIMERVILLE, on behalf of BENTON COUNTY, OREGON, et al, *Intervenor-Defendants-Appellees.*	U. S. District Court District of Oregon FILED MAY 14, 1979 Robert M. Christ Clerk No. 76-3722 DC CV 76-34 JMB

JUDGMENT

APPEAL from the United States District Court for the District of Oregon (Portland).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon (Portland) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause, be, and hereby is affirmed.

Filed and entered March 9, 1979.

United States

COURT OF APPEALS

for the Ninth Circuit

STAN SKOKO, et al, on behalf of CLACKAMAS COUNTY, OREGON,
Plaintiffs-Appellants,
vs.
CECIL D. ANDRUS, Secretary of the Interior, et al,
Defendants-Appellees,
and
JEANETTE SIMERVILLE, on behalf of BENTON COUNTY, OREGON, et al,
Intervenor-Defendants-Appellees.

FILED
MAR. 9, 1979

Emil E. Melei, Jr.,
Clerk
U. S. Court of Appeals

No. 76-3722
OPINIONS

Appeal from the United States District Court for the District of Oregon

Before: DUNIWAY and CHOY, Circuit Judges, and GRANT,* District Judge.

DUNIWAY, Circuit Judge:

There is no merit in this appeal.

Between 1866 and 1870, Congress granted almost 4,000,000 acres of land to the Oregon & California Railroad to promote the construction of a railroad from Portland, Oregon, to the California Border. The granting statutes contained a proviso, "That the lands

*The Honorable Robert A. Grant, Senior United States District Judge for the Northern District of Indiana, sitting by designation.

granted . . . shall be sold to actual settlers only in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre." *Oregon & California Railroad Co.* v. *United States*, 1915, 238 U.S. 393, 403.

The railroad was built, but the proviso was violated. As a result, Congress, by joint resolution, directed the Attorney General to enforce the proviso. 38 Stat. 571 (1908). In the ensuing action, supra, the Court held that the proviso was a covenant, not a condition. It therefore refused to forfeit the lands still owned by the railroad, ordered the covenant enforced, and gave Congress "a reasonable time" to frame the remedy. *Id.* at 438-39.

Congress responded with the Chamberlain-Ferris Revestment Act of June 9, 1916, 39 Stat. 218, which declared all undisposed of grant lands "hereby revested in the United States." 39 Stat. 219. Congress further established a procedure to compensate the railroad for the grant lands thus revested. The Court upheld the remedy in *Oregon & California Railroad Co.* v. *United States*, 1917, 243 U.S. 549.

The Revestment Act also established the "Oregon & California land-grant fund" (hereafter "the O&C fund") within the United States Treasury. Since that time all revenues that the United States has derived from the former grant lands have been paid into the fund. A series of Congressionally enacted formulae has controlled distributions from the O&C fund.

However, there is nothing in the Revestment Act,

nor in subsequent acts, nor in the decisions of the Supreme Court, that purports to subject the lands to a trust in favor of the Oregon counties, or to create a contract between Congress and the counties entitling the latter to any moneys from the fund. Title to the revested lands was established in the United States, subject to no restrictions, covenants or conditions whatever. The lands became part of the public domain. *See Clackamas County, Oregon v. McKay*, D.C. Cir., 1955, 226 F.2d 343, 345.

The Revestment Act provided a three-part distribution. First, the fund was to be used to pay the railroad the amounts due it. Second, the fund was to reimburse the United States for having paid 18 Oregon Counties ("the O&C Counties") back taxes the railroad had owed on grant lands located within those counties when they were revested. Third, once these payments had been made the fund would then be distributed 25% to the O&C Counties, 25% to the state of Oregon, 40% to the reclamation fund in the United States Treasury created by § 1 of the 1902 Reclamation Act, 43 U.S.C. § 391, and 10% to the general fund in the United States Treasury. The railroad's claims have been paid in full, and it has no interest in this litigation.

Between 1916 and 1926, the United States derived little revenue from the O&C lands. As a result, the third stage payments to the counties never materialized. To assist the O&C counties, Congress passed the Stanfield Act of July 13, 1926, 44 Stat. Part 2, 915. It provided for payments from the general fund of the

Treasury in lieu of taxes. It also provided that those payments would be an aggregating reimbursable charge against the O&C fund. Thus, before O&C fund moneys could go to the counties under the third stage of the Revestment Act formula, the O&C fund had to reimburse the general fund for all of the general fund payments to the Counties in lieu of taxes. Between 1926 and 1937, the general fund payments in lieu of taxes exceeded the revenues from the O&C lands with the result that the excess general fund payments became an ever-increasing reimbursable charge against the O&C fund.

In 1937 Congress passed the O&C Sustained Yield (or McNary) Act, 50 Stat. 874, 43 U.S.C. § 1181, which provided that most of the O&C lands would henceforth be managed for sustained-yield timber production. Title II of the Act, the focus of the dispute in this case, completely restructured the distribution of O&C revenues. Repealing all prior conflicting statutes, it divided the O&C fund's annual revenues into three parts, a first 50%, a first 25%, and a second 25%.

The first 50% was to go outright to the O&C counties. The first 25% was to go initially to cover the Stanfield Act payments in lieu of taxes accruing through March 1, 1938. Next, this first 25% would go into the Treasury's general fund to begin paying off the reimbursable charges which had accumulated against the O&C fund because in previous years the payments in lieu of taxes had exceeded total O&C revenues. Finally, when all the reimbursable charges had been taken care of, the counties were to get this first

25% portion in addition to the first 50% portion for an eventual total of 75%.

The last 25% was to be available for the administration of the sustained yield program in such amounts as Congress determined. Any part of this second 25% not used for administering the program was to go into the Treasury's general fund to be first applied to satisfy any still outstanding reimbursable charges against the O&C fund.

The reimbursable charges had been paid off by 1951. Thus, in 1952 the O&C counties began to receive a full 75% of the O&C fund revenues, the first 50% plus the first 25%, as provided by 43 U.S.C. § 1181(f)(b).

Since 1953 the counties have received shares ranging from 50 to 64%. Appellant County Commissioners assert that § 1181(f)(b) has entitled them to a full 75% in every year since 1953. Alleging that the differences between the full 75% and the percentages received have over the past 25 years amounted to over $180,000,000, appellants seek an order requiring the Secretaries to pay over that amount to the O&C counties.

The Secretaries concede that the terms of § 1181(f)(b) would have given the counties a 75% share beginning in 1953, absent later legislation. However, a proviso contained in 25 consecutive Interior Department appropriation acts since 1953 has annually amended § 1181(f)(b) to require the Secretaries to pay out the lesser shares challenged by appellants. We

agree that the annual Appropriation Act provisos have amended § 1181(f)(b) to limit the counties to the lesser shares.

Since 1960, Congress has annually appropriated 25% of the O&C revenues for the management of the O&C lands. Appellant Commissioners argue that the Secretaries should have paid these management expenses out of the second 25% of the O&C funds, leaving the first 25% fully available to be added onto the first 50% going to the O&C counties. This construction is plainly wrong because each appropriation act has provided, in essence, that the first 25% must be paid into the general fund of the Treasury.

The critical proviso reads:

> * * * *Provided further*, That the amount appropriated herein is hereby made a reimbursable charge against the Oregon and California land grant fund and shall be reimbursed to the general fund in the Treasury in accordance with the provisions of the second paragraph of subsection (b) of title II of the Act of August 28, 1937. (50 Stat. 876) 89 Stat. 978.

The second paragraph of subsection (b) of title II of the Act of August 28, 1937, provides that

> [the first] 25 per centum shall be accredited annually to the general fund in the Treasury of the United States until all reimbursable charges against the Oregon & California land-grant fund owing to the general fund in the Treasury have been paid. . . . When the general fund in the Treasury has been fully reimbursed for the expenditures

> which were made charges against the Oregon & California land-grant fund said 25 per centum shall be paid annually . . . to the several counties. . .

While the appropriated management expenses initially come out of the second 25% of the O&C revenues in accordance with 43 U.S.C. § 1181(f)(c), the proviso makes it clear that those management expenses become a reimbursable charge against the O&C fund. Reimbursing the general fund in accordance with the second paragraph of subsection (b) means paying the first 25% revenues into the general fund until the amount pand in covers the amount of the second 25% appropriated for management and improvements. When, as has happened since 1960, Congress appropriates the entire second 25% for management and improvements, the Secretaries must pay the entire first 25% into the general fund to comply with the second paragraph of subsection (b). When the entire first 25% must be paid into the general fund to fully reimburse the charges, no first 25% funds remain to be paid to the counties who thus must be satisfied with the first 50% of the O&C fund revenues.[1] Congress has inserted the same provision in every Appropriation Act since 1960.[2] (fn. on p. 31).

Once the O&C lands revested in the United States

[1] Between 1953 and 1959, Congress appropriated fixed dollar amounts for improvements instead of appropriating a full 25%. Since the first 25% revenues exceeding the fixed dollar amounts in each of those years, a portion of that first 25% remained for distribution to the counties after the general fund had been fully reimbursed. Thus the counties received an extra 1 to 14% of O&C fund revenues during this period.

under the Chamberlain-Ferris Revested Act of 1916, the O&C lands and their revenues became exclusively the property of the United States. *Clackamas County, Oregon* v. *McKay, supra*, 226 F.2d 343, 345. Congress had the power to decide what portion of the O&C revenues, if any, to distribute to the counties. As the District of Columbia Circuit explained in an earlier lawsuit involving these same lands,

> . . . The courts cannot interfere with the administration of public property as arranged by the Congress and the Executive, so long as constitutional boundaries are not transgressed by either branch or statutory ones by the latter. *Clackamas County, Oregon* v. *McKay, supra*, 226 F.2d at 346.

When the United States reacquired the property it became exempt from state and local taxes, and the former taxing bodies had no compensable rights against the United States. The O&C counties had "nothing more than an expectation of collecting future taxes on the parcel(s) in question. That such an expectation is not a compensable interest in a condemned parcel is well settled since to permit a state or a municipality to recover on such a claim would violate the long recog-

[2]

Fiscal Year	Citation	Fiscal Year	Citation
1976	89 Stat. 978	1967	80 Stat. 170-171
1975	88 Stat. 803	1966	79 Stat. 174-175
1974	87 Stat. 429	1965	78 Stat. 273
1973	86 Stat. 508	1964	77 Stat. 97
1972	85 Stat. 229-230	1963	76 Stat. 335
1971	84 Stat. 669-670	1962	75 Stat. 246
1970	83 Stat. 147-148	1961	74 Stat. 105
1969	82 Stat. 426	1960	73 Stat. 93
1968	81 Stat. 59-60		

nized immunity of the federal government from the taxing power of the states.." *United States* v. *6.321 Acres of Land, Etc., Suffolt County*, 1 Cir., 1973, 479 F.2d 404, 406. *See also, United States* v. *city of Glen Cove, E.D.N.Y.*, 1971, 322 F. Supp. 149, 155, *aff'd*, 2 Cir., 1971, 450 F.2d 884; *cf. Mullen Benevolent Corp.* v. *United States*, 1933, 290 U.S. 89, 94-95; *Adaman Mutual Water Company* v. *United States*, 9 Cir., 1960, 278 F.2d 842, 849-50; *Columbia Irrigation District* v. *United States*, 9 Cir., 1959, 268 F.2d 128, 131-32.

Whatever the Congress did to alleviate the loss of tax revenues suffered by the O&C counties when the O&C lands were revested in the United States was an act of grace on the part of the Congress. It conferred no rights upon the counties to the continuance of Congress' bounty. Congress could amend or repeal the Act in question without infringing any right of the counties.

The amendments contained in the appropriation acts are valid. The Secretaries have complied with them.

Appellants excoriate Congress for using appropriation acts as its vehicles to alter the effects of the McNary Act. It is well settled that Congress can amend substantive legislation by including appropriate language in appropriations bills. *United States* v. *Dickerson*, 1940, 310 U.S. 554, 555; *City of Los Angeles* v. *Adams*, D.C. Cir., 1977, 556 F.2d 40, 48-49; *National Labor Relations Board* v. *Thompson Products*, 9 Cir., 1944, 141 F.2d 794, 797-99.

The appellants have no case.

Affirmed.

A-1

United States

COURT OF APPEALS

for the Ninth Circuit

STAN SKOKO, et al, on behalf of CLACKAMAS COUNTY, OREGON, *Plaintiffs-Appellants*, vs. CECIL D. ANDRUS, Secretary of the Interior, et al, *Defendants-Appellees*, and JEANETTE SIMERVILLE, on behalf of BENTON COUNTY, OREGON, et al, *Intervenor-Defendants-Appellees.*	FILED May 1, 1979 Emil E. Melfi, Jr. Clerk U.S. Court of Appeals No. 76-3722 ORDER

Before: DUNIWAY and CHOY, Circuit Judges and GRANT,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion of a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion of a rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion of a rehearing in banc is rejected.

*The Honorable Robert A. Grant, Senior United States District Judge for the Northern District of Indiana, sitting by designation.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

STAN SKOKO, THOMAS TELFORD and ROBERT SCHUMACHER, Board of County Commissioners, on behalf of CLACKAMAS COUNTY, OREGON, a political subdivision of the state of Oregon,	)	
Plaintiffs,	)	Civil No. 76-34
vs.	)	JUDGMENT
THOMAS KLEPPE, SECRETARY OF THE INTERIOR OF THE UNITED STATES, and WILLIAM SIMON, SECRETARY OF THE TREASURY OF THE UNITED STATES,	)	
Defendants,	)	
JEANETTE SIMERVILLE, LARRY CALLAHAN and DALE D. SCHROCK, Board of County Commissioners on behalf of BENTON COUNTY, OREGON,	)	
Intervening Defendants.	)	

Based on the record,

IT IS ORDERED that Plaintiffs motion for summary judgment is denied.

IT IS FURTHER ORDERED that the motions of Defendant and Intervening Defendant to dismiss are granted and the action is dismissed.

DATED this 20 day of September, 1976.

James M. Burns

JAMES M. BURNS
United States District Judge

APPENDIX C

28 U.S.C. #1254

Court of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Statutory grounds: 28 U.S.C. § 1361 which states:

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty ..."

11 Stat. 383

ACT OF CONGRESS ADMITTING THE STATE OF OREGON INTO THE UNION

PREAMBLE

Whereas the people of Oregon have framed, ratified, and adopted a constitution of state government which is republican in form, and in conformity with the Constitution of the United States and have applied for admission into the Union on an equal footing with the other states; therefore —

1. ADMISSION OF STATE-BOUNDARIES

That Oregon be, and she is hereby, received into the Union on an equal footing with the other states in all respects whatever, with the following boundaries: In order that the boundaries of the state may be known and established, it is hereby ordained and declared that the State of Oregon shall be bounded as follows to-wit: Beginning one marine league at sea, due west from the point where the forty-second parallel of north latitude intersects the same; thence northerly, at the same distance from the line of the coast lying west and opposite the state, including all islands within the jurisdiction of the United States, to a point due west and opposite the middle of the north ship channel of the Columbia River; thence easterly, to and up the middle channel of said river, and, where it is divided by islands, up the middle and widest channel thereof, to a point near Fort

Walla Walla, where the forty-sixth parallel of north latitude crosses said river, thence east, on said parallel, to the middle of the main channel of the Shoshone or Snake River, thence up the middle of the main channel of said river, to the mouth of the Owyhee River; thence due south, to the parallel of latitude forty-two degrees north; thence west, along said parallel, to the place of beginning, including jurisdiction in civil and criminal cases upon the Columbia River and Snake River, concurrently with states and territories of which those rivers form a boundary in common with this state.

APPENDIX D

16 Stat. 94

FORTY-FIRST CONGRESS

Sess. II Cu. 69. 1870.

May 4, 1870

CHAP. LXIX. — *An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from Portland to Astoria and McMinnville, in the State of Oregon.*

Land Grant to Oregon Central Railroad Company.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill river, near McMinnville, in the State of Oregon, there is hereby granted to the Oregon Central Railroad Company, now engaged in constructing the said road, and to their successors and assigns, the right of way through the public lands of the width of one hundred feet on each side of said road, and the right to take from the adjacent public lands materials for constructing said road, and also the necessary lands for depots, stations, side tracks, and other needful uses in operating the road, not exceeding forty acres at any one place; and, also, each alternate section of the public lands, not mineral, excepting coal or iron lands, designated by odd numbers nearest to said road, to the amount of ten such alternate sections per mile, on each side thereof, not otherwise disposed of or reserved or held by valid pre-emption or homestead right at the time of the passage of this act. And in case the quantity of ten full sections per mile cannot be found on each side of said road, within the said limits of twenty miles, other lands designated as aforesaid shall be selected under the direction of the Secretary of the Interior on either side of any part of said road nearest to and not more than twenty-five miles from the track of said road to make up such deficiency.

Right of way and to take materials.

Lands for depots, &c. Alternate sections, except, &c.

Lands to be selected to make up deficiency.

Lands on line of road to be surveyed.

Sec. 2. *And be it further enacted,* That the commissioner of the general land office shall cause the lands along the line of the said railroad

[The prior granting acts are basically the same. The effect of the grant was to give the O&C Railroad Co. every odd section of unappropriated land from Portland to the California line. The grant was within 30 miles of each side of the track and was earned by completing 20 miles of track and then receiving the land coterminous with the finished construction.]

APPENDIX E

ANNUAL APPROPRIATION BILLS

Act of July 9, 1952, P.L. 82-470, 66 Stat. 445, 447; Act of July 31, 1953, P.L. 83-172, 67 Stat. 261, 263; Act of July 1, 1954, P.L. 83-465, 68 Stat. 361, 363; Act of June 16, 1955, P.L. 84-78, 69 Stat. 141, 142; Act of June 13, 1956, P.L. 84-573, 70 Stat. 257, 258; Act of July 1, 1957, P.L. 85-77, 71 Stat. 257, 258; Act of June 4, 1958, P.L. 85-439, 72 Stat. 155, 156; Act of June 23, 1959, P.L. 86-60, 73 Stat. 92, 93; Act of May 13, 1960, P.L. 86-455, 74 Stat. 104, 105; Act of August 3, 1961, P.L. 87-122, 75 Stat. 246; Act of August 9, 1962, P.L. 87-578, 76 Stat. 335; Act of July 26, 1963, P.L. 88-79, 77 Stat. 96, 97; Act of July 7, 1964, P.L. 88-356, 78 Stat. 273; Act of June 28, 1965, P.L. 89-52, 79 Stat. 174; Act of May 31, 1966, P.L. 89-435, 80 Stat. 170; Act of June 24, 1967, P.L. 90-28, 81 Stat. 59; Act of July 26, 1968, P.L. 90-425, 82 Stat. 425, 426; Act of October 29, 1969, P.L. 91-98, 83 Stat. 147; Act of July 31, 1970, P.L. 91-361, 84 Stat. 669; Act of August 10, 1971, P.L. 92-76, 85 Stat. 229; Act of August 10, 1972, P.L. 92-369, 86 Stat. 508.

The pertinent language in all the Annual Appropriation Bills is substantially as follows:

3. The fourth paragraph of Title I, Department of the Interior and Related Agencies Appropriation Act, 1976 and the period ending September 30, 1976, 89 Stat. 977, 977-978, reads as follows:

TITLE I - DEPARTMENT OF THE INTERIOR LAND AND WATER RESOURCES

BUREAU OF LAND MANAGEMENT

* * * * *

OREGON AND CALIFORNIA GRANT LANDS

For expenses necessary for management, protection, and development of resources and for construction, operation, and maintenance of access roads, reforestation, and other improvements on the revested Oregon and California Railroad grant lands, on other Federal lands in the Oregon and California land-grant counties of Oregon, and on adjacent rights-of-way; and acquisition of rights-of-way and of existing connecting roads on or adjacent to such lands; an amount equivalent to 25 per centum of the aggregate of all receipts during the current fiscal year from the revested Oregon and California Railroad grant lands, to remain available until expended: Provided, That the amount appropriated herein for the purposes of this appropriation on lands administered by the Forest Service shall be transferred to the Forest Service, Department of Agriculture:

*** Provided further, That the amount appropriated herein is hereby made a reimbursable charge against the Oregon and California land grant fund and shall be reimbursed to the general fund in the Treasury in accordance with the provisions of the second paragraph of subsection (b) of title II of the Act of August 28, 1937 (50 Stat. 876).

APPENDIX F

EXCERPTS FROM HEARINGS ON THE COMMITTEE ON PUBLIC LANDS

75th Congress
H.R. 5858, April 15, 1937

Statement of Rugus G. Poole, Esq., Assistant Solicitor of the Secretary of Interior:

"Adjudging the Railroad Company of abrogating these conditions, the Congress passed an Act forfeiting to or revesting these lands in the United States. This Act is commonly known as the Chamberlain-Ferris Act. Its main object was to carry out the originally planned disposition and maintain the relative rights of interested parties under the original Granting Act."

* * * * *

Mr. Mott: The purpose of the act was to revest these lands in the Government because the railroad company had violated some of the conditions of the grant, and for the Government to reimburse these counties for the loss of the taxes which the lands would have paid had they remained in private ownership, as the original grant contemplated, and that was about $480,000 a year.

* * * * *

Mr. Mott: The purpose of that act, Mr. Lemke, I think can most clearly be explained by saying that it was the intention of Congress to put the land-grant counties as nearly as possible in the position that they

would have been in had this land remained in private ownership and had the counties continued to receive taxes.

* * * * *

Mr. Mott: I know that is your view and that is the view of the Interior Department, but that has never been the view of Congress, nor is the solution of the problem which Congress agreed to in 1916 when the lands were revested, and in 1926, when the act was perfected by amendment. The policy of the United States in that regard has already been settled. Now, I know that you have a different viewpoint, but I do not see any merit or fairness in comparing the revenue produced from these revested grant lands and that from Federal lands that were never in private ownership, and which we never had the right to tax. These lands now in the ownership of the Federal Government were taken off the tax rolls by the Federal Government without our consent and by reason of circumstances with which we have nothing to do, and because they were taken off the tax rolls by the Government, the Federal Government undertook by the revestment law to reimburse us. I do not think there is any fairness in comparison of revenues under the revestment act and under the National Forest Act.

APPENDIX G

McNARY ACT of 1937

Title II Formula

Sub-Paragraph (a)

50% To the 18 O&C Counties.

Sub-Paragraph (b)

25%
1. Reimburse gov't. for all advances past due a/c lands.
2. Balance to counties.

Sub-Paragraph (c)

25%
(1) To gov't for administration.
(2) Balance to General Fund.
(3) Provided: NO reimburseable items remaining in (b) above...

APPENDIX H

McNary Act of 1937 50 Stat. 874

(PUBLIC—No. 405—75th Congress)
(Chapter 876—1st Session)
(H.H. 7618)

Relating to the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands situated in the State of Oregon.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That notwithstanding any provisions in the Acts of June 9, 1916 (39 Stat. 218), and February 26, 1919 (40 Stat. 1179), as amended, such portions of the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands as are or may hereafter come under the jurisdiction of the Department of the Interior, which have heretofore or may hereafter be classified as timberlands, and power-site lands valuable for timber, shall be managed, except as provided in section 3 hereof, for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal *(sic)* of sustained yield for the purpose of providing a permanent source of timber supply protecting watersheds, regulating stream flow, *and contributing to the economic stability of local communities and industries*, and providing recreational facilities; Provided: That nothing herein shall be construed to interfere with the use and development of power sites as may be authorized by law.

The annual productive capacity for such lands shall be determined and declared as promptly as possible

after the passage of this Act, but until such determination and declaration are made the average annual cut therefrom shall not exceed one-half billion feet board measure: Provided, That timber from said lands in an amount not less than one-half billion feet board measure, or not less than the annual sustained yield capacity when the same has been determined and declared, shall be sold annually, or so much thereof as can be sold at reasonable prices on a normal market.

If the Secretary of the Interior determines that such action will facilitate sustained yield management, he may subdivide such revested lands into sustained-yield units, the boundary lines of which shall be so established that a forest unit will provide, insofar as practicable, a permanent source of raw materials *for the support of dependent communities* and local industries of the region; but until such subdivision is made the land shall be treated as a single unit in applying the principle of sustained yield; Provided, That before the boundary lines of such forest units are established, the Department, after published notice thereof, shall hold a hearing thereon in the vicinity of such lands open to the attendance of State and local officers, representatives of dependent industries, residents, and other persons interested in the use of such lands. Due consideration shall be given to established lumbering operations in subdividing such lands when necessary *to protect the economic stability of dependent communities.* Timber sales from a forest unit shall be limited to the productive capacity of such unit, and the Secretary is authorized, in his discretion, to reject any bids which may interfere with the sustained-yield management plan of any unit.

Section 2. The Secretary of the Interior is authorized, in his discretion, to make cooperative agreements with other Federal or State forest administrative agencies or with private forest owners or operators for the coordinated administration with respect to time, rate, method of cutting, and sustained yield, of forest units comprising parts of revested or reconveyed lands, together with lands in private ownership or under the administration of other public agencies, when by such agreements *he may be aided in accomplishing the purposes herein before mentioned.*

Section 3. The Secretary of the Interior is authorized to classify, either on application or otherwise, and restore to homestead entry, or purchase under the provisions of section 14 of the Act of June 28, 1934 (48 Stat. 1269, any of such revested or reconveyed land which, in his judgment, is more suitable for agricultural use than for afforestation, reforestation, streamflow protection, recreation, or other public purposes.

Any of said lands heretofore classified as agricultural may be reclassified as timber lands if found, upon examination, to be more suitable for the production of trees than agricultural use, such reclassified timber lands to be managed for permanent forest production as herein provided.

Section 4. The Secretary of the Interior is authorized, in his discretion, to lease for grazing any of said revested or reconveyed lands which may be so used

without interfering with the production of timber or other purposes of this Act as stated in section I: Provided, That all the moneys received on account of grazing leases shall be covered into the "Oregon and California land grant fund" or the "Coos Bay Wagon Road grant fund" in the Treasury as the location of the leased lands shall determine, and be subject to distribution as other moneys in such funds: Provided further, That the Secretary is also authorized to formulate rules and regulations for the use, protection, improvement, and rehabilitation of such grazing lands.

Section 5. The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect. The Secretary of the Interior is further authorized, in formulating forest-practice rules and regulations, to consult with the Oregon State Board of Forestry, representatives of timber owners and operators on or contiguous to said revested and reconveyed lands, and other persons or agencies interested in the use of such lands.

In formulating regulations for the protection of such timberlands against fire, the Secretary is authorized, in his discretion, to consult and advise with Federal, State and county agencies engaged in forst-fire-protection work, and to make agreements with such agencies for the cooperative administration of fire regulations therein: Provided, That rules and regulations for the protection of the revested lands from fire shall conform with the requirements and practices of the State of Oregon insofar as the same are consistent with the interests of the U.S.

McNARY ACT of 1937, 50 Stat 874

TITLE II

That on and after March 1, 1938, *all moneys deposited* in the Treasury of the United States *in the special fund designated* the "Oregon and California land-grant fund" shall be distributed annually as follows:

(a) *Fifty per centum to the counties* in which the lands revested under the Act of June 9, 1916 (39 Stat. 218), are situated, to be payable on or after June 30, 1938, and each year thereafter to each of said counties in the proportion that the total assessed value of the Oregon and California grant lands in each of said counties for the year 1915 bears to the total assessed value of all of said lands in the State of Oregon for said year, such moneys to be used as other county funds.

(b) *Twenty-five per centum to said counties as money in lieu of taxes accrued* or which shall accrue to them prior to March 1, 1938, under the provisions of the Act of July 13, 1926 (44 Stat. 915), and which taxes are unpaid on said date, such moneys to be paid to said counties severally by the Secretary of the Treasury of the United States, upon certification by the Secretary of the Interior, *until such tax indebtedness as shall have accrued prior to March* 1, 1938, *is extinguished.*

From and after payment of the above accrued

taxes said 25 *per* centum *shall be accredited annually to the general fund in* the Treasury of the United States *until all reimbursable charges against the Oregon and California land-grant fund owing to the general fund in the Treasury have been paid: Provided,* That if for any year after the extinguishment of the tax indebtedness accruing to the counties prior to March 1, 1938, under the provisions of Forty-fourth Statutes, page 915, the total amount payable under subsection (a) of this title is less than 78 per centum of the aggregate amount of tax claims which accrued to said counties under said Act for the year 1934, there shall be additionally payable for such year such portion of said 25 per centum (but not in excess of three-fifths of said 25 per centum), as may be necessary to make up the deficiency. *When the general fund in the Treasury has been fully reimbursed for the expenditures which were made charges against the Oregon and California land-grant fund said 25 per centum shall be paid annually, on or after* June 30, *to the several counties* in the manner provided in subsection *(a)* hereof.

(c) *Twenty-five percentum* to be *available* for *the administration* of this Act, in such annual amounts as the Congress shall from time to time determine. *Any part of such per centum not used for administrative purposes shall be covered into the general fund of the Treasury of the United States: Provided, That moneys covered into the Treasury in such manner shall be used to satisfy the reimbursable charges against the Oregon and California land grant fund mentioned in*

subsection (b) so long as any such charges shall exist.

All Acts or parts of Acts in conflict with this Act are herby repealed to the extent necessary to give full force and effect to this Act.

Approved, August 28, 1937.

APPENDIX I

39 Stat. 218

Chamberlain-Ferris Act

SIXTY-FOURTH CONGRESS
Sess. I. Ch 137. 1916

Whereas by the Acts of Congress approved April tenth, eighteen hundred and sixty-nine (Fourteenth Statutes at Large, page two hundred and thirty-nine), and May fourth, eighteen hundred and seventy (Sixteenth Statutes at Large, page ninety-four), it was provided that the lands granted to aid in the construction of certain railroads from Portland, in the State of Oregon, to the northern boundary of the State of California, and from Portland to Astoria and McMinnville, in the State of Oregon, should be sold to actual settlers only, in quantities not exceeding one hundred and sixty acres to each person and at prices not greater than $2.50 per acre; and

Whereas the Oregon and California Railroad Company, beneficiary of said acts, has violated the terms under which the said lands were granted by selling certain of said lands to persons other than actual settlers, by selling in quantities of more than one-quarter section to each person, by selling at prices in excess of $2.50 per acre, and by refusing to sell any further portions of such lands to actual settlers at any price, and in so doing has willfully violated the terms of the statutes by which the said lands were granted; and

Whereas in the suit instituted by the Attorney General of the United States, pursuant to the authority and direction contained in the joint resolution of April thirtieth, nineteen hundred and eight (Thirty-fifth Statutes at Large, page five hundred and seventy-one), the Supreme Court of the United States, in its decision rendered June twenty-first, nineteen hundred and fifteen (Two hundred and thirty-eighth United States, page three hundred and ninety-three), ordered that the Oregon and California Railroad Company be enjoined from making further sales of lands in violation of the law, and that the said railroad company be further enjoined from making any sales whatever of either the land or the timber thereon until Congress should have a reasonable opportunity to provide for the disposition of said lands in acordance with such policy as Congress might deem fitting under the circumstances and at the same time secure to the railroad company all the value conferred by the granting Acts; and

Whereas it was expressly provided by section twelve of the Act of July twenty-fifth, eighteen hundred and sixty-six (Fourteenth Statutes at Large, page two hundred and thirty-nine), that Congress might at any time, having due regard for the rights of the grantee railroad company, add to, alter, amend, or repeal the Act making the grant; and

Whereas the Oregon and California Railroad Company and its predecessors in interest receiving a large sum of money from sales of said land for prices in excess of $2.50 per acre, and from leases, interest on contracts, and so forth; and

Whereas the aforesaid granting Acts conferred upon the said railroad company the right to receive not more than $2.50 per acre for each acre of land so granted: Therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the title to so much of the lands granted by the Act of July twenty-fifth, eighteen hundred and sixty-six, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon." as amended by the Acts of eighteen hundred and sixty-eight and eighteen hundred and sixty-nine, for which patents have been issued by the United States, or for which the grantee is entitled to receive patents under said grant, and to so much of the lands granted by the Act of May fourth, eighteen hundred and seventy, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon," for which patents have been issued by the United States, or for which the grantee is entitled to receive patents under said grant, as had not been sold by the Oregon and California Railroad Company prior to July first, nineteen hundred and thirteen, be, and the same is hereby revested in the United States: *Provided,* That the provisions of this Act shall not apply to the right of way to the extent of one hundred feet in width on each side of the railroad and all lands in actual use by said railroad company on December ninth, nineteen hundred and fifteen, for depots, sidetracks, wood yards, and standing grounds.

APPENDIX J

SENATE JOINT MEMORIAL No. 6

To the Honorable Senate and the House of Representatives of the United States of America, in Congress assembled:

We, your memorialists, the Senate and House of Representatives of the State of Oregon, in legislative session assembled, most respectfully represent and petition as follows:

Whereas the revested Oregon and California grant lands now administered by the Secretary of the Interior of the United States under the provisions of the Act approved August 28, 1937, (50 stat. 874) were originally granted to the railroad company for the purpose of building and settlement of the State of Oregon; and

Whereas such lands, by reason of their mountainous nature, were unsuited for sale to agricultural settlers and Congress thereafter forfeited the grant to the railroad company for violation of terms of the grant, the lands have been revested in the United States; and

Whereas Congress has the power to enact legislation transferring title of such lands to the State of Oregon subject to such terms and conditions as it may impose; and

Whereas it shall be the policy of the State of Oregon to retain title to such lands, and to administer

efficiently such lands for the benefit of the people of Oregon; now therefore,

Be It Resolved by the Senate of the State of Oregon, the House of Representatives jointly concurring therein:

That the Congress of the United States be and it hereby is memorialized to pass such legislation as will result in the transfer of the title of such lands to the State of Oregon, subject to such terms and conditions as the Congress of the United States may deem just and equitable in the circumstances.

Filed in the office of the Secretary of State April 27, 1951.

APPENDIX K

EDITORIAL PAGE OF THE OREGON JOURNAL PORTLAND

If we live in the Spirit, let us also walk in the Spirit — Galations 5:25.

1/20/52

$1 BILLION O&C LAND DEAL

If you had a legitimate claim on a billion dollars worth of Oregon timber land now held in trust by the government, would you pass it up?

If you had an established claim on 75 per cent of the returns from this land, would you settle for less — say half that amount?

If you had another equally valid claim upon at least 50 per cent of a $5 million trust fund tied up in jurisdictional dispute between the department of agriculture's forest service and the department of interior's bureau of land management, would you let it lie?

An obvious "no" answer is indicated to all three questions. But, strangely enough, members of the Oregon delegation in the congress and members of the Association of Oregon and California Land Grant Counties (O&C) are debating all three questions.

At the moment, they show no inclination to try to regain state sovereignty over the 2½ million acres of O&C lands bearing some 50 billion feet of merchantable timber. They merely shrug the whole thing off as impracticable.

They appear willing to waive their claims, under the McNary Act of 1937, to 75 per cent of the returns from timber sales from O&C lands -- to which they are entitled for the first time this year — and accept a lesser amount.

Satisfied With Split

They are not even in agreement on a suit instituted by the Lane county court to compel disbursement of the $5 million accumulated in the timber sale fund from half a million acres of "controverted" land claimed by both forest service and the bureau of land management.

The 13 Oregon counties in which the O&C lands lie appear satisfied with the 50-50 split they have enjoyed up to this year (amounting to $3.2 million last year). They have authorized Frank Sever, their attorney, to go to Washington and accept that kind of settlement. And this attitude has been reflected by Senator Guy Cordon, who formerly represented them, and by Representative Harris Ellsworth, who introduced companion bills at the last session, providing for perpetuation of the old 50-50 arrangement.

They have finally decided, however — as has Senator Cordon — to fight the interior department's bill which would give the Oregon counties about 32 per cent and BLM 68 per cent of future returns from O&C timber lands.

But other Oregon congressmen have shown little interest. This despite the fact that the 1951 Oregon

legislature almost unanimously memorialized the congress to transfer trusteeship of O&C lands back to the state of Oregon which exercised sovereignty over these lands for 37 years.

Lafferty Stirs Things Up

And neither the Oregon congressmen nor most Oregon editors have taken seriously the determined campaign of A. W. Lafferty, former Oregon congressman, for a better deal for Oregon on O&C lands.

We have reexamined the whole O&C lands issue, since we approved the legislature's joint memorial last spring.

We have come to the conclusion first, that the O&C timber lands controversy is of utmost importance to the state of Oregon. The fact that O&C timber sales are now being made at the rate of $10 million a year and may some day reach $100 million a year on a sustained yield basis is, of itself, sufficient evidence to support this position.

We also have come to the conclusion that the state's claims to O&C lands are valid, under the U. S. supreme court decision of 1915 and under the Chamberlain, Stanfield and McNary acts. Editor Walter W. R. May of the Oregon City Enterprise-Courier agrees. So do County Judge Day T. Bayly of Lane county and State Senators Jack Lynch and Howard Belton, who sponsored the Oregon legislature's O&C land memorial to congress.

We are surprised that editor Charles Sprague of

the Oregon Statesman is so readily inclined to belittle Oregon's claims, while supporting the move of Lane county to seek apportionment of the $5 million in the "controverted" land fund. The fact that Mr. Sprague is a member of the bureau of land management advisory committee may explain it.

We were disappointed in the willingness of Senator Cordon to compromise Oregon's claims to 75 per cent of O&C timber sales, but we're glad to note that he has withdrawn his amendment to the McNary act and will oppose the interior department's drastic bill.

Os West Had 'Pipe Dream'

We are startled to see that "Os" West, doughty fighter and former governor who once declared for returning sovereignty over O&C lands to the state, now feels that it was merely one of his pleasant "pipe-dreams."

Perhaps, as editor Sprague assumes, Mr. Lafferty is attempting to ride back into congress on the O&C land issue. We don't know or care. We merely think he happens to be right about the O&C issue.

The state's sovereignty over O&C lands was recognized in the original grant of 1868. This grant to the Oregon & California railroad contained a settler's clause, providing that the land was to be sold to settlers at not to exceed $2.50 an acre and in blocks not to exceed 160 acres. Thus the land became "state land." It was held in trust by the O&C railroad for development of the state. It went on state and county

tax rolls. And it remained there until 1915, after a Portland federal judge found the railroad in violation of the settlers' clause and ordered the lands forfeited.

Should Try to Regain Lands

But the U. S. supreme court completely reversed the Portland decision. It held that the original congressional grant was final and issued an injunction against further violations of the grant. It recognized railroad and tax claims. The congress then amended the law, "revesting" the lands in the government for administrative purposes and setting forth the method of distributing O&C proceeds to the government, the state and the counties and of paying back taxes and reimbursing the railroad. The decision was never successfully challenged.

The railroad in 1916 did protest the decree entered by the federal court at Portland in conformity with the supreme court's decision. The railroad raised the point for the first time that the timber and minerals were separate from the lands and that, while the grants required the company to sell the lands to actual settlers, this did not include the timber and minerals. The supreme court rejected the contention and confirmed its original opinion. It did allow the railroad $6250 to pay the cost of its original appeal from the lower court's decree of forfeiture which was reversed.

The very fact that congress ordered the land "revested" in the government indicated that it had actually been vested in private ownership for 37 years. It is unfortunate that the state did not then assert its

claims to the land and did not stand on the constitutional provision that lands can be acquired for federal use only with state consent.

In light of this situation, we believe that the state, through its congressional delegation, should attempt to regain sovereignty over O&C lands as requested by the 1951 legislature.

Oregon should take its claim to the U. S. court of claims, then to the congress where states' rights sentiment is growing.

The Association of Oregon & California Land Grant Counties and the Oregon delegation in congress also should make a determined fight against the department of interior's attempt to raid the O&C timber sale fund. The land-grant counties have the money and the legal talent to do it and Oregon congressmen should have the intestinal fortitude to carry on the fight. Governor McKay should be interested.

And the argument over the controverted lands trust fund should be taken to court. Oregon counties have an equally valid claim on this fund.

Shall we fight for our O&C land rights or yield? Federal bureaucracy already owns or controls 56 per cent of our land. That's too much.

Our hunch is to fight — on all three fronts.

APPENDIX L

EDITORIAL - OREGON JOURNAL
IT'S OUR O&C MONEY

Date January 1951

Clackamas and Lane county commissioners are both consistent and wise to bring suit for their counties' share of the so-called "controverted lands" trust fund which now totals approximately $5 million.

At least 50 per cent of this fund (held in trust while the department of interior and department of agriculture settle their jurisdictional dispute over a half million acres of O&C land) belongs to 13 Oregon counties.

Five other O&C counties hold none of the controverted land and therefore have no interest in this particular trust fund. But the 13 counties are entitled to their proportionate share of it. They should collect it.

Why still other counties do not join the Clackamas and Lane suits is beyond us. They have everything to gain and nothing to lose by such an action. Both the supreme court and the congress have held that the controverted land — about one fifth of the 2½ million acres embraced in the original grants to the Oregon & California railroad and revested 37 years later in the government for administrative purposes—is O&C land.

The 13 counties having claims on the impounded timber returns from this land have a perfect case.

The case is so good that A. W. Lafferty, congressional candidate and No. 1 champion of Oregon's claims to O&C lands, believes a peremptory court order could be obtained, without resort to long-winded hearings in the U. S. court of claims.

Back to the controverted lands issue is the much broader question of the proper division of timber returns from all O&C lands.

Under pressure from the department of agriculture, which has written a bill giving it control of all O&C lands, and the department of interior, which for years has attempted to preempt an ever-greater share of the returns from O&C timber, Senator Cordon and Representative Ellsworth have reintroduced identical bills, S 1385 and HR 4005.

These bills would reduce the share of 18 Oregon counties in O&C timber sales from the current 75 per cent (effective last year under the McNary act) to 50 per cent.

If this bill goes through, Clackamas county's share will be cut from a current $246,000 to approximately $180,000—a loss of about $66,000 a year on the basis of current timber sales.

Lane county, which stands to collect almost $760,000 a year from its O&C lands (including the controverted lands) will be hit even harder. Douglas, Jackson and other counties will suffer losses varying with their proportionate claims on O&C land funds.

An even worse deal than this one is now proposed

by five of the six members of the executive committee of the Association of Oregon & California Land Grant counties (County Judge Wallace Telford of Clackamas county dissenting). This committee agreed to empower the association's attorney, Frank Sever, to accept a $3 million a year "floor payment" in lieu of the 75 per cent to which the counties are entitled under the law.

This deal would limit Clackamas county's share of O&C timber sales to about $156,000 a year. A clear net loss of at least $90,000 a year in perpetuity would result. And Lane county would be hit much harder.

The only excuse we can think of for acceptance of either of these deals is that they might appease the department of interior, which would like to amend the Cordon-Ellsworth percentage bill to give Oregon counties only 31 per cent of the proceeds from O&C lands, the government hogging the balance.

Frankly speaking, we don't like any part of these two appeasement moves. We believe that Oregon congressmen and Oregon counties are being coerced by Washington bureaucrats into yielding firmly established rights to 75 per cent of the proceeds from these O&C lands.

We believe that Judge Telford and Commissioners Jones and Skoko of Clackamas county, District Attorney Leonard Lindas and special counsel Alden Miller are right in fighting it out, first, for immediate division of the $5 million controverted land trust fund and, second, against any reduction in the Oregon coun-

ties' share in O&C timber sales. The same goes for Lane county commissioners and District Attorney C. E. Luckey.

Despite the publicly expressed fears of Senator Cordon, Representative Ellsworth and attorney Sever, we do not believe that the congress will be a party to any such bureaucratic raids on O&C land funds.

If we weaken now, we might as well throw in the sponge, writing off valid claims to some $7½ million a year. This would be a staggering blow to the tax structures and economies of 18 Oregon counties.

APPENDIX M

LETTERS TO EDITOR OF RECENT DATE
THE PEOPLE'S OWN CORNER

O&C BENEFIT

To the Editor: You are right in urging Clackamas County to continue the O&C litigation against the United States (June). If the county appeals and is successful, not only will Oregon's integrity remain unblemished but the entire state will benefit economically (350 million worth), even though only the 18 O&C counties are entitled to payment.

Your editorial serves other important purposes:

1. It reminds the people of Oregon that they must initiate soon the required machinery to recover for Oregon full sovereignty over the O&C lands of which the state was deprived through unconstitutional congressional enactments; otherwise, there will be no one left having direct knowledge of the case. Many principals of the case are deceased already.

2. It is a timely invitation to the O&C county officials to reconsider the reason for their opposition. There is a glaring error in their logic. They are setting the stage for the very congressional action they wish to avoid. Their opposition is probably leading Congress to believe that Oregonians will accept anything offered them without fighting for what is rightfully theirs. If Clackamas County drops the case, Congress likely will attempt a reduction of future payments.

I propose that Clackamas County Commissioner Stan Skoko, former Clackamas County Commissioner

R. Bradley; Donald Walker, legal counsel for Clackamas County, and other Oregonians with direct knowledge and information in this matter constitute themselves as a cadre to initiate the effort mentioned in my purpose No. 1.

Thomas J. Ballen
531[illegible]. E. 40th Ave.

ARTICLE HALF RIGHT

Recently you printed a guest editorial from the Grants Pass Daily Courier, "O&C Suit Right, but Wrong." That editorial was half right and half wrong. The editorial contends that if Clackamas County wins, the other states will focus their attention on Oregon and change the unique formula.

That unsteadiness and unwillingness to believe that Oregon has a vested interest and sovereign right in these lands is what is causing the fear tactics expressed in the editorial. Even Ray Doerner, of the O&C Association, in the Umpqua News, stated that the "O&C lands were our heritage." A solemn right cannot be politically taken away by the other states.

Clackamas County's main problem has always been that the other counties won't take the time to fully understand that the rights of the O&C lands are founded on a solid rock. It is much more sensible to stand fast for our rights than to join the federal government against Clackamas County. The 15 counties opposing Clackamas County are totally wrong and the day is coming when Clackamas County will be recognized as being totally right.

If you're right, you cannot be wrong. The sum due is no longer $182 million, but well over $300 million — a right worth fighting for.

Stan Skoko
Commissioner of Clackamas County, Oregon City

O&C WATCHDOGS

To The Editor: Your editorial staff is to be commended for their clear and concise coverage of the facts relating to Clackamas County's O&C suit brought against the federal government.

Clackamas County Commissioners Stan Skoko, Thomas Telford and Robert Schumaker are deserving of the gratitude of every Oregonian for having the courage to open this Pandora's box before the U.S. courts. In placing the public interest ahead of policital expediency, they have reasserted Oregon's sovereign rights and heritages for this and future generations. They have challenged the forces who have conspired to "keep Oregonians green" on the Oregon & California land grant story.

Oregon's economic and ecologic future is critically dependent on the remaining 2.5 million acres of priceless O&C timber lands, and the disposition of the multimillions of dollars derived annually from this vast empire.

Oregonians may sleep well knowing they still have some diligent and honest watchdogs of the O&C on

duty. Portland attorney Donald Walker also deserves laurels for his fine preparation of the case for Clackamas County.

Pauline Dawson
11 Condolea Drive,
Lake Oswego

FIGHTS FOR RIGHTS

Your Aug. 2 editorial page had a "View from Grants Pass" entitled "O&C Suit Right, but Wrong." In the guest editorial, the writer says, "But the feds keep 25 percent of the counties' share for administration and for road development.

That statement circumvents the real factual situation. The formula requires 75 percent to be paid to the counties and 25 percent to be used for administration and road development. The federal government is not doing that. They are pocketing more than 95 percent of the designated share for administration, placing it in the federal treasury and spending 33 percent of the counties' share, which they have no authority to do.

It is hard to believe that any responsible Oregonian could recognize that a right exists and not fight for it. Instead they adopt the position that it is better to remain silent, hoping that political expediency is a safer route. Has the federal government become so powerful and tyranical that O&C timber holding counties dare not take court action to recover what legally belongs to them? It is a very undignified position for the State of Oregon to be in.

John S. Whiteneck, Jr.
Beaverton

APPENDIX N

OREGONIAN AND CALIFORNIA RAILROAD GRANT LANDS

Friday, April 23, 1926

UNITED STATES SENATE,
COMMITTEE ON PUBLIC LANDS AND SURVEYS
Washington, D.C.

The committee met at 3 o'clock p.m., pursuant to adjournment on yesterday, in the committee room, Capitol, Senator Robert N. Stanfield presiding.

Present: Senators Stanfield (chairman), Oddie, and Jones of New Mexico.

THE CHAIRMAN: The committee will come to order. Mr. Cordon, will you take the stand?

Statement of Guy Cordon, District Attorney,
Roseburg, Douglas County, Oregon

The CHAIRMAN. Will you give your name and address for the record, Mr. Cordon?

MR. CORDON. Guy Cordon; Roseburg, Douglas County, Oregon.

Mr. Chairman and gentlemen of the committee, considerable has been said by the various members of our delegation relative to the great portion of the area of our State that is in the public domain, that having reference to the unappropriated portion of the domain which is open to entry, and that portion unappropriated which is withheld in various kinds of Government reserves — forest reserves, Indian reserves, and the like.

Reference has been made to this area only, as I take it, to more clearly point out the need of our counties to have the use of the balance of the State; in other words, that portion of the State of which primary disposition has been made, including these grant lands.

Now, there is an essential and fundamental difference in the status of these O&C grant lands and the Government-owned lands, in the State outside of those lands. The other Government-owned lands, which we term the unappropriated public domain, are held by the Government as an attribute of its sovereignty — that is, on the theory that the Government in the first instance is the owner of all the lands within its borders and that it continues to have title until such time as it divests itself of the title by what we term the primary disposition. Private ownership results from such a divestiture of Government title.

Now, we concede that the Government—the United States—is the proprietor of the public domain, and, like any other owner of land, . . .

APPENDIX O

1952 hearings

of the Subcommittee of the Senate on Appropriations on HR 7176, 82nd Cong. 2nd Session, April 16 - May 16, 1952, p. 1543.

See the following colloquy:

SENATOR ELLENDER:

Instead of paying the counties 75 percent, pay them 50 percent and use the 25 percent for these access roads?

SENATOR CORDON:

No, it would not work that way.

SENATOR ELLENDER:

Would the counties receive finally only the 50 percent?

SENATOR CORDON:

No, they might receive only the 50 percent. They would probably receive somewhat more. The 25 percent for administration goes to the government (fourth 25 percent); 50 percent would definitely go to the counties; the remaining 25 percent would be available to the extent it was necessary to repay these costs. If there was any left over, then it would still go to the counties.

APPENDIX P

Editorial

THE OREGONIAN

January 16, 1976

O&C CASE ON MERITS

Congress has been picking Oregon's pocket for almost a quarter-century while commissioners of the 18 O&C Grant Land counties, fearful of losing more if they protested, have relinquished millions to the federal Treasury. Now the Clackamas County Commission, weary of this charade, has filed suit in federal court to regain $182 million for all 18 counties it contends was misappropriated to the federal coffers.

The suit filed by Portland attorney Donald C. Walker, a longtime student of the complex Oregon-California Grant Lands history, duplicates an earlier suit brought by a group of Clackamas County taxpayers. That suit was thrown out on the allegation that the plaintiffs lacked "standing to sue" — as if taxpayers were not making up for the diversion of funds owed the county. The elected Clackamas County Commission is presumed to have "standing" superior to that of its constituents, a vagary of federal justice, so at last, it appears, the complaint will be tried on its merits.

In 1866, Congress granted four million acres of farm and forest lands in Oregon, a 30-mile strip on both sides of the proposed right-of-way, to the Oregon & California Railroad Co., to be resold to settlers at $2.50 per acre, to build a railroad from Portland to the

California border. The railroad violated terms of the agreement. The Supreme Court reversed a lower court order for absolute forfeiture of the grant lands but directed Congress to carry out the original intent of the grant, which was to provide lands for settlers as well as to build a railroad.

The Chamberlain Act of 1916 ordered the federal sale of land to settlers at the rate of $2.50 per acre, to help pay for the railroad. But much of the land was virgin timberland, not suitable for farming. The McNary Act of 1937 put the timberlands into what amounted to a federal trust for the benefit of counties and communities.

Title II of the McNary Act provided that the first 50 per cent of revenues from timber sales would go to the 18 counties, the next 25 per cent would go to the government to reimburse the railroad only until that obligation had been cleared, and the fourth 25 per cent would be used by the government to administer and manage the forest lands. The railroad debt was paid off in 1951. In 1952, the counties received the full 75 per cent to which they were entitled under terms of the McNary Act.

In 1953, however, the Association of O&C Counties entered into what the complaint charges was an improper agreement with congressional committees to give up the third 25 per cent of timber revenues. Defenders of this agreement contend that riders attached to appropriation acts in Congress had the same effect as amendments of the McNary Act. The Clackamas

complaint asks the court to disallow that. The complainants also contend that the Department of Interior, which administers the O&C lands through the Bureau of Land Management, has not even spent all of its 25 per cent of revenues to manage the forest.

Commissioners in other O&C counties intervened in opposition to the earlier suit, fearful that retaliatory legislation in Congress would deprive them of their present 50 per cent of revenues from timber sales and perhaps give them only 25 per cent, the cut provided counties from national forest harvesting. But the O&C lands are neither national forest nor public domain lands. They are in a unique category. In fact, the Oregon Legislature in 1951, petitioned Congress to cede the remaining O&C lands, 2.5 million acres, to the State of Oregon to affirm rights of state sovereignty. Somehow, the memorial never was presented to Congress.

If this suit puts the fat in the fire, as some county officials say and as some Oregon members of Congress may believe, the other 17 O&C counties have nothing to lose by joining Clackamas County. Surely, the taxpayers of their counties would appreciate distribution of the $182 million, plus the annual returns thereafter of the 75 per cent of timber sale revenues the never-amended McNary Act awarded them. If the federal courts confirm the unique nature of the O&C grant lands, Congress would be ill-advised to try to treat them as public domain.

APPENDIX Q

Editorial

THE OREGONIAN

O&C DUMPED AGAIN

Wednesday, September 1, 1976

U.S. District Judge James M. Burns noted the "strange and haunting fascination in the Oregon Country with the saga of the O&C Grant Lands" as he dismissed Clackamas County's suit to reclaim $182 million in O&C timber earnings the county contends were improperly withheld by the government.

It is equally strange, and even haunting, that the county cannot get a hearing in court on its claims. One suit, by Clackamas taxpayers, was rejected by federal court in Portland and the Ninth Circuit Court of Appeals forl ack of standing to sue. The current action filed by Atty. Donald Walker for the Clackamas County Commission was dismissed by Judge Burns for lack of jurisdiction.

Judge Burns said he could not order the secretaries of the interior and treasury to pay the 16 Oregon counties which have Oregon and California Railroad grant lands, repossessed by the government, the $182 million because the amount exceeded the statutory limit for his court of $10,000.

Counsel for the county cited a number of cases in which federal district courts had tried suits against

the government involving more than $10,000, but Judge Burns said he was denied jurisdiction by opinions of the Ninth Circuit and the Supreme Court.

Atty. Walker may have to take the case to the U.S. Court of Claims, asuming Clackamas County does not weary of the effort or bow to political pressure from some other O&C counties and members of Congress. Opponents of the suit fear Congress may reduce the counties' O&C revenues from 50 per cent of sales to 25 per cent, the counties' contribution from national forest sales, if a court awards them the 75 per cent federal statutes originally gave them.

Judge Burns evidently believes that Clackamas County should seek a remedy elsewhere than in the courts. But Congress has been blinking at its own laws and diverting money from O&C sales by the power of the Appropriations committees for 20 years. It does not seem right that the courts can continue to avoid ruling on Clackamas Count's petition for redress of a grievance.

APPENDIX R

Editorial

ENTERPRISE COURIER

OREGON CITY, OREGON

July 9, 1952

O&C ISSUE DRAWS MORE INTEREST

It is commendable that the Portland Oregonian has deemed it advisable to comment editorially at length on the O&C program which so vitally affects 18 Oregon counties. The problem is one of the most important national issues that has a direct and lasting bearing on the state. The Oregonian editorial, however, in some instances, leaves the wrong impression.

The issue should long ago have commanded considerable more comment on the part of newspapers in the state, particularly those in the 18 O&C counties. Widespread interest should hasten settlement of a matter which — although settled both in the courts in 1925 and by Congress in 1937 — just won't stay settled.

The reason the matter continually pops up is due primarily, we believe, to the capricious action of the secretary of the Department of Agriculture some ten years ago in claiming jurisdiction over 472,000 acres of O&C lands, which the court and Congress had recognized as being under jurisdiction of the Department of Interior.

This capricious claim resulted in eventual recognition of the so-called "controverted" O&C lands and the

establishment of a controversy which has been a thorn in the side of several persons for many years.

It is unfortunate, however, that the iritation did not spread more widely. Even the 18 O&C counties have been, and are, woefully ignorant of the facts of the situation, although the issue represents millions of dollars in revenue to them.

For one reason or another, only a handful of men in the state have ever investigated the matter fully enough to acquire a basic knowledge of the issue. With the exception of Sen. Guy Cordon and Representative Harris Ellsworth, Oregon's own Congressional delegation is admittedly ignorant of the facts. The issue has always been Sen. Cordon's "baby," and, in our opinion, he has not brought our (his) child up according to the best state interests. But that's another story.

* * * * *

Law Holds Answer

The point at issue is that the Department of Agriculture be forced to abide by the rulings of the courts and of Congress. That is the object of Clackamas county's present suit against the departments of agriculture and interior. When that issue is solved, then will be the time to sit down and discuss the 1937 Congressional action giving the 18 O&C counties 75 per cent of O&C land revenues.

We believe that percentage is just. Congress also thought so in 1937, and members of Congressional committees holding hearings on the "controverted"

portion of the problem apparently also have generally thought so. The Department of Interior would undoubtedly like to have more than 25 per cent of those revenues, but we have seen little evidence that Congress is in a mood to deprive Oregon counties of their granted rights. And if Sen. Cordon is so frightened over that possibility, we again invite him — in fact, demand that he tell the 18 O&C counties about it.

Last year the counties' share changed from 50 to 75 per cent of the total, as charges against the fund were paid off. But a congressional committee objected to appropriation for access roads under such a sharing of the proceeds. Compromise bills were introduced by Cordon and Ellsworth to return to the 50-50 basis, but the interior department wasn't satisfied with this; it wanted to share on such a basis after certain expenses had been deducted. This would have reduced the counties' share to possibly 35 per cent of the gross. The legislation is still pending. This year Senator Cordon compromised again to get roads built on a senate appropriations committee recommendation that $2,750,000 for that purpose be taken from the counties' part of the income.

Lafferty has attacked the senator's action in letters to the county courts, congress and the newspapers. He has charged that the counties would be building roads into Oregon forests owned by "the Weyerhaeuser monopoly, and other private owners."

APPENDIX S

ENTERPRISE COURIER

OREGON CITY, OREGON
April 22, 1952

WHAT, SEN. CORDON, ARE YOU UP TO?

Like a bunch of sheep being led to slaughter, five of the six members of the executive committee of the association of O&C Counties meeting last week in Portland "heeded the voice" and voted to negotiate to sell out the rights of the counties they represent and of the state of Oregon for an unnamed but fixed annual "security" fund to a federal bureau.

The "voice" in this instance is Sen. Guy Cordon speaking through Attorney Frank Sever, who succeeded him as attorney for the Association of O&C counties.

In the immediate years preceding his being named to the United States Senate to fill the unexpired term of Sen. Charles McNary, following that estimable legislator's death, Guy Cordon did a mignificent job to bring order on a just plane out of the Oregon & California land grant situation. He worked hard and effectively to establish the right of the 18 Oregon counties having O&C timberlands to receive the full percentage of revenue from sales of timber from those lands as clearly set down by Congressional action in 1937.

. . . . .

The 18 Oregon O&C counties have paid for those lands out of their own pockets, with the last payment being made in 1951.

Now those same counties are entitled to full returns from their investment. They are entitled to the full 75 per cent. which Attorney Cordon, now Sen. Cordon, fought so hard to have established as their lawful share.

What is not understandable is why that same Sen. Cordon is now trying to talk these 18 Oregon counties into accepting way less than their lawful percentage of revenue.

And, if Sen. Cordon insists upon playing "footsy" with the Department of Interior in a manner contrary to his own former beliefs and in a manner contrary to the best interests of the state and particularly of 18 counties in the state, we will be forced to change our former great respect and personal admiration for him into action to make his stay in Washington as uncomfortable and short-lived as possible.

APPENDIX T

Enterprise Courier

Editorial January 22, 1976

County O&C suit valid contention

A lot of criticism has been hurled at the Clackamas County Board of Commissioners in recent weeks for trying to rock the O&C boat.

Most of the fears expressed concerning the county's suit seem to suggest the federal government will strike the wind from the "sales" of timber which provide revenue for all O&C counties.

Moreover, the lack of support from other counties for the suit also suggests to outsiders that Clackamas County is focusing on a shady deal which the O&C counties are trying to hide.

However, neither fear is justified.

The Oregon and California (O&C) Land Grant, the McNary Act and subsequent revisions and amendments are relatively clear: Though O&C forests lie within 18 Oregon counties, the acreages are federally-owned and administered. A portion of the revenue from timber sold from the land reverts back to the counties.

Oregon's O&C counties initially were to receive 75 per cent of all revenue from the timber under the terms of the 1937 McNary Act. However, a "plowback" formula approved by O&C counties in 1953 gave the federal government an additional 25 per cent or half of the timber revenue. The purpose of the plowback was to provide funds for fire control, reforestration and road building.

The counties refrained from balking at the additional funds for the federal government since the money would be used "specifically" to improve the safety, access and management of the forests.

Clackamas County's suit seeking $182 million from the federal government contends that federal officials have not been using the total fund for the operations stipulated in the 1953 plowback agreement.

The county does not attack the basic operation of the O&C formula, only the alleged non-compliance of the federal government in regards to the management fund. If the federal government has been placing the surplus money from the management fund into the U.S. Treasury, as the Clackamas County suit contends, then we must agree with the county and demand that federal officials make good the loss to the O&C counties.

Quite often county and city governments are penalized for failure to comply with the letter of federal law. Therefore, if the suit contention is correct, we believe the federal government has an obligation to settle the bill with Clackamas County and its reluctant O&C partners. BMcC

APPENDIX U

THE OREGONIAN FEB. 22, 1976

Weaver is wrong

To the Editor: Congressman Weaver's opposition to your editorial support of Clackamas County's O&C suit is not founded on a valid premise. He states that the $187 million (actually $182 million) that Clackamas County is seeking to have returned to Oregon "has been used by the Bureau of Land Management to enhance our valuable timber lands."

The fact of the matter is that Clackamas County is seeking the $182 million that was not invested in reforestation and plow-back activities. The $182 million represents the sum that the federal government transferred into the general fund, contrary to the requirements of the McNary Act.

Oregon has vested rights in these valuable O&C timber lands. I believe the congressman should assume a stance that the O&C lands and the distribution of funds are not vulnerable to just any whim of Congress.

The U.S. Supreme Court decision of 1915 very succinctly stated that these lands did not revert to the federal government.

Regardless of whether one is for or against Clackamas County's bringing the suit, the approval or opposition should be predicated on facts and not political expediency.

I think that the time is way overdue that the history and the legal ramifications of the O&C lands be brought out into the open. Clackamas County is rendering a real service to the people of Oregon by having the courage to institute these proceedings and I wish it a great deal of luck.

Oregon's basic rights are at stake.

CLAY MYERS,
Secretary of State,
1610 Fir St., S.,
Salem.

APPENDIX V

238 U.S. 393

OREGON & CALIFORNIA RAILROAD COMPANY
v. UNITED STATES.

No. 679. Argued April 23, 26, 27, 1915.—Decided June 21, 1915.

P.434

There was a complete and absolute grant to the railroad company with power to sell, limited only as prescribed, and we agree with the Government that the company "might choose the actual settler; might sell for any price not exceeding $2.50 an acre; might sell in quantities of 40, 60, or 100 acres, or any amount not exceeding 160 acres." And we add, it might choose

P 439

If Congress does not make such provision the defendants may apply to the District Court within a reasonable time, not less than six months, from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act, and the court in its discretion may modify the decree accordingly.

Decree reversed and cause remanded to the District Court for further proceedings in accordance with this opinion.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of the case.

End

Supreme Court, U. S.
FILED
SEP 25 1979
MICHAEL RODAK, JR., CLERK

No. 79-197

In the Supreme Court of the United States

OCTOBER TERM, 1978

STAN SKOKO, ET AL., PETITIONERS

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 24-32) is not reported. The district court's judgment (Pet. App. 34) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1979 (Pet. App. 23). A petition for

rehearing was denied on May 1, 1979 (Pet. App. 33). The petition for a writ of certiorari was filed on July 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether certain counties in Oregon containing grant lands of the Oregon & California Railroad revested in the United States are entitled to 75 percent of the annual revenues from such lands.

STATEMENT

In 1866 Congress granted approximately 4,000,000 acres of public land (the "O&C grant lands") to the Oregon & California Railroad to aid construction of a railroad from Portland, Oregon, to the California border.[1] The granting legislation, as amended in 1869, contained a homestead proviso requiring the railroad company to sell the grant lands not used for railroad purposes "to actual settlers" in tracts not larger than a quarter section (160 acres) and at a price not exceeding $2.50 per acre. Although the railroad eventually built the line, it repeatedly violated the homestead proviso.

As a result of these violations, Congress directed the Attorney General to bring suit against the railroad to enforce the rights of the United States. 35

[1] Act of July 25, 1866, ch. 242, 14 Stat. 239, as amended by the Act of April 10, 1869, ch. 27, 16 Stat. 47. Additional provisions and grants appear in the Acts of June 25, 1868, ch. 80, 15 Stat. 80, and May 4, 1870, ch. 69, 16 Stat. 94.

Stat. 571. In 1915 this Court held that the railroad's violation of the homestead proviso did not justify forfeiture without compensation, and that Congress should devise a remedy "within a reasonable time" to "secure" to the railroad "all the value" that the granting acts had conferred. *Oregon & C.R.R.* v. *United States*, 238 U.S. 393, 438-439 (1915).

In response, Congress passed the Chamberlain-Ferris Revestment Act of June 9, 1916, ch. 137, 39 Stat. 218, 219, which declared that all undisposed O&C grant lands were thereby "revested in the United States" and set forth procedures to secure to the railroad the "full value" of the grant.[2] The Revestment Act also established a special account in the United States Treasury (the "O&C fund") for all revenues derived from the revested O&C grant lands. From this fund the railroad was to receive the amount due to it; thereafter the United States was to be reimbursed for its payments made to 18 Oregon counties containing O&C grant lands ("O&C counties") for taxes on the lands delinquent up to the date of revestment. Once this was done, the Revestment Act directed that distribution of the O&C fund revenues be made four ways every fiscal year: 25 percent to the

[2] Subsequently, this Court held that the Act constituted the "execution" of its previous judgment and rejected the railroad's challenge to the statute. *Oregon & C.R.R.* v. *United States*, 248 U.S. 549, 556-560 (1917). The value to which the railroad was entitled for the revested lands was determined in an accounting suit between the United States and the railroad as authorized by the Revestment Act. *United States* v. *Oregon & C.R.R.*, 8 F.2d 645 (D. Ore. 1925).

O&C counties; 25 percent to the State of Oregon; 40 percent to the reclamation fund in the United States Treasury (see Reclamation Act of 1902, ch. 1093, Section 1, 32 Stat. 388, 43 U.S.C. 391); and 10 percent to the general fund in the United States Treasury (Pet. App. 26).

Between 1916 and 1926 little revenue was derived from the O&C lands, and no payments were made to the counties. To assist the counties, Congress passed the Stanfield Act of July 13, 1926, ch. 897, 44 Stat. 915. This Act authorized payment from the Treasury of an amount equivalent to the taxes which would have accrued against the land from 1916 to 1926 if it had remained in private ownership. The Act further provided that in each year after 1926 an amount equal to taxes was to be paid out of the receipts from the O&C fund. Congress required that whatever annual amounts were paid out in lieu of taxes to the O&C counties from the Treasury would constitute an ever-growing reimbursable charge against the O&C fund. So long as the charge remained outstanding, distributions from the O&C fund in accordance with the formula of the Revestment Act would cease until the O&C fund became large enough to reimburse the tax-equivalent payments made from general federal funds. From 1926 to 1937, however, the receipts from the O&C lands were sufficient to pay only a portion of the tax-equivalent payments to the counties. The payments from the Treasury became an increasingly large reimbursable charge against ~~against~~ the O&C fund (Pet. App. 26-27).

In 1937 Congress enacted the O&C Sustained-Yield Act, ch. 876, 50 Stat. 874 (the "McNary Act"), as amended, 43 U.S.C. 1181a *et seq.* Title I of the McNary Act provided that the lands were to be managed primarily for sustained-yield timber production, for sale of timber, and for grazing under federal lease. Title II of the McNary Act, which is at issue in this case, completely restructured the distribution of O&C fund revenues. Repealing all prior conflicting statutes, Title II directed that the O&C fund's annual revenues be divided into three parts: the first 50 percent, the next 25 percent, and the final 25 percent. The first 50 percent was to go outright to the 18 O&C counties. The next 25 percent was initially to cover the Stanfield Act tax-equivalent payments for taxes accruing up to March 1, 1938. Thereafter, this 25 percent would go to the general fund in the Treasury to satisfy reimbursable charges (such as those created by the Stanfield Act) against the O&C fund. The Act provided that, once these reimbursable charges were paid, this 25 percent segment would be paid annually to the O&C counties in the same manner as the first 50 percent. 43 U.S.C. 1181f(b). Finally, the last 25 percent was "to be available for the administration of [this Act], in such annual amounts as the Congress shall from time to time determine." 43 U.S.C. 1181f(c). Any part of this final 25 percent not used for administration was to go to the general fund in the Treasury to satisfy any outstanding reimbursable charges against the O&C fund. In essence, then, the McNary Act required annual payments to the

O&C counties of 50 percent of O&C revenues and as much as 75 percent of these revenues once the reimbursable charges against the O&C fund were paid off.

Not until 1951 did the O&C counties become eligible for the 75 percent share, for it was not until then that all reimbursable charges had been repaid (Pet. App. 28). Faced with the prospect that the full 75 percent might go to the counties, and concerned that the 75 percent share was overly generous, Congress reviewed the distribution scheme. Eventually, a legislative compromise was arrived at under which all sums appropriated for access roads on O&C lands were made reimbursable charges against the O&C fund within the meaning of 43 U.S.C. 1181f(b). Interior Department Appropriation Act of 1953, ch. 597, 66 Stat. 445, 447; see S. Rep. No. 1803, 82d Cong., 2d Sess. 4 (1952).

Since 1953, a virtually identical proviso has been included annually in every Interior Department appriations act, stating that all sums appropriated for "management, protection, and development of resources and for construction, operation, and maintenance of access roads, reforestation, and other improvements" on O&C lands shall be considered reimbursable charges against the O&C fund. See, *e.g.*, Title I of the Department of the Interior and Related Agencies Appropriations Act for the Fiscal Year Ending September 30, 1979, Pub. L. No. 95-465, 92 Stat. 1279-1280; see also Pet. App. 30, 31 n.2. Prior to 1960, Congress appropriated a specific dollar amount for these purposes; since 1960, it has appropriated an

amount equal to 25 percent of the O&C fund revenues for these purposes (Pet. App. 30).

The effect of such provisos in the appropriations acts has been to amend the 1937 McNary Act annually. Under this amendment, the 18 O&C counties continue to receive the first 50 percent of O&C fund revenues each fiscal year. The next 25 percent, which the counties would otherwise receive under the 1937 statute, is applied to reimburse the Treasury for access roads and other improvements on O&C lands. It is this arrangement that petitioners challenge in the present case.

Petitioners, the county commissioners of Clackamas County, Oregon (one of the 18 O&C counties), brought this action in the United States District Court for the District of Oregon against the respondent Secretaries of the Interior and of the Treasury. Petitioners claimed that the O&C counties were entitled to the entire "next 25 percent" of O&C fund revenues in addition to the first 50 percent.[8] They further alleged that respondents had improperly withheld approximately $182,000,000 due to the counties under the McNary Act. They sought a writ of mandamus compelling respondents to pay over that amount and an injunction directing them to distribute

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[8] An earlier suit seeking the same relief had been brought by several Clackamas County taxpayers. Their suit was dismissed because, as taxpayers, they were not real parties in interest under Rule 17(a), Fed. R. Civ. P. *Jones* v. *Schultz*, No. 73-2790 (9th Cir. July 23, 1974), cert. denied, 420 U.S. 912 (1975).

the full 75 percent of all future O&C fund revenues to the counties.

The district court dismissed the action (Pet. App. 34). The court of appeals affirmed (Pet. App. 24-32). It held that respondents had properly interpreted the provisos in the annual appropriations acts as requiring that the O&C counties' share of the revenues be reduced from 75 percent to 50 percent and that the amendments themselves were valid.

ARGUMENT

The decision of the court of appeals is correct and does not warrant further review.

1. Petitioners contend (Pet. 19) that the O&C counties are entitled to annual distributions equivalent to 75 percent of the O&C fund revenues rather than the 50 percent they have been receiving. Although we agree that under the McNary Act, 50 Stat. 874, 43 U.S.C. 1181a *et seq.*, as enacted in 1937, the O&C counties would have been entitled to 75 percent shares for every year since fiscal year 1953, Congress has prohibited that result by enacting a proviso in every Interior Department appropraitions act since 1953. The effect of the proviso is that the "next 25 percent" of O&C fund revenues, instead of going to the O&C counties, is plowed back into the O&C lands in the form of access roads, reforestation, and other improvements. Congress has thus decided that the O&C counties are to receive 50 percent of the annual

revenues, not 75 percent; the 25 percent share that the counties do not receive directly is allocated to maintaining and improving the O&C lands.

Petitioners argue (Pet. 12-14) that the costs of maintaining and improving the O&C lands should be borne by the second 25 percent of the revenues, which was originally earmarked by Congress for the reimbursement of administrative expenses in connection with the O&C lands. However, the provisos enacted by Congress clearly state that the appropriated amounts are to be considered "reimbursable charges" against the O&C fund in accordance with 43 U.S.C. 1181f(b)—the subsection that deals with the "next 25 percent" of revenues.[4] If Congress had wanted the Treasury to be reimbursed for access road construction and other improvements from the final 25 percent (as opposed to the "next 25 percent"), it would have so provided.

The respondents' interpretation of the statutory language is also supported by the legislative history

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[4] For example, the proviso contained in the Interior Department appropriation act for fiscal year 1979 states (92 Stat. 1280):

> *Provided further,* That the amount appropriated herein is hereby made a reimbursable charge against the Oregon and California land grant fund and shall be reimbursed to the general fund in the Treasury in accordance with the provisions of the second paragraph of subsection (b) of title II of the [McNary] Act of August 28, 1937 (50 Stat. 876).

of the Interior Department appropriations acts.[5] Moreover, in every year since 1953, respondents have distributed O&C fund revenues according to their consistent interpretation of the proviso—that the Treasury is to be reimbursed from the 25 percent share which would otherwise go to the counties. By its successive reenactment of the proviso language with knowledge of this interpretation, Congress has implicitly ratified respondents' construction of the statutory scheme and their method of distribution. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-382 (1969); *Boesche* v. *Udall*, 373 U.S. 472, 483 (1963).

2. Petitioners maintain that Congress cannot use subsequent appropriations acts to amend the provisions of the McNary Act. However, Title II of the McNary Act is itself an appropriations act. This was the understanding in 1938 of the House Appropriations Committee, which regarded the distributions in the McNary Act as "available for expenditure without annual appropriation by Congress." H.R. Rep. No. 1855, 75th Cong., 3d Sess. 6 (1938). Cf. *United States* v. *Hanson*, 167 F. 881, 884-885 (9th Cir. 1909). Congress can, of course, modify or discontinue prior appropriations as it sees fit.

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[5] See, *e.g.*, *Interior Department Appropriations for 1953: Hearings on H.R. 7176 Before a Subcomm. of the Senate Comm. on Appropriations*, 82d Cong., 2d Sess. 1543 (1952); S. Rep. No. 1803, 82d Cong., 2d Sess. 4 (1952); S. Rep. No. 345, 86th Cong., 1st Sess. 5-6 (1959).

Moreover, even if Title II of the McNary Act were not an appropriations act, petitioners' argument would be without merit. It is well established that Congress can amend substantive legislation by appropriations bills, so long as it does so explicitly. *United States* v. *Dickerson*, 310 U.S. 554, 555-556 (1940); *City of Los Angeles* v. *Adams*, 556 F.2d 40, 48-49 (D.C. Cir. 1977); *NLRB* v. *Thompson Products*, 141 F.2d 794, 797-799 (9th Cir. 1944); cf. *TVA* v. *Hill*, 437 U.S. 153, 190 (1978).

3. Petitioners also contend (Pet. 15-16) that Congress was powerless to amend the McNary Act to reduce the share of revenues received by the O&C counties because such an amendment conflicts with this Court's decision in *Oregon & C.R.R.* v. *United States*, 238 U.S. 393 (1915). According to the petitioners, that decision established that absolute title to the O&C lands had vested in the railroad company, and therefore state sovereignty attached and could not be vitiated by a subsequent congressional enactment. Petitioners apparently contend that once Congress granted the lands to the railroad and the lands became subject to taxation by the State of Oregon, Congress could not thereafter reacquire the lands and remove them from the state tax rolls.

These arguments have no merit. In *Oregon & C. R.R.* v. *United States*, *supra*, this Court required only that the United States secure to the railroad the full value of the grant. The Court did not require that Congress dispose of the lands to settlers or compensate the state for the loss of tax revenues. Once the

lands were revested in the United States and the railroad was compensated for the revestment, the O&C lands and their revenues became the exclusive property of the United States. *Clackamas County* v. *McKay*, 226 F.2d 343 (D.C. Cir. 1955). When the United States acquires property by purchase or condemnation, the municipality that loses taxing authority over the property obtains no compensable rights against the United States. *United States* v. *6.321 Acres of Land*, 479 F.2d 404, 406 (1st Cir. 1973). See also *United States* v. *City of Glen Cove*, 322 F. Supp. 149, 155 (E.D.N.Y.), aff'd, 450 F.2d 884 (2d Cir. 1971); cf. *Mullen Benevolent Corp.* v. *United States*, 290 U.S. 89, 94-95 (1933). Therefore, petitioners have no property interest in the O&C lands or the O&C fund until and unless Congress directs that distributions be made from the fund, and it is for Congress alone to determine how much revenue will be distributed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 301865 88

Supreme Court, U. S.
FILED
AUG 29 1979
MICHAEL RODAK, JR., CLERK

79-197

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1979

STAN SKOKO, THOMAS TELFORD and ROBERT SCHUMACHER, Board of County Commissioners, on behalf of CLACKAMAS COUNTY OREGON, A Political Subdivision of the State of Oregon,

Petitioners,

v.

CECIL D. ANDRUS (successor to Thomas Kleppe) SECRETARY OF THE INTERIOR OF THE UNITED STATES, and W. MICHAEL BLUMENTHAL (successor to William Simon) SECRETARY OF THE TREASURY OF THE UNITED STATES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR INTERVENORS-RESPONDENTS IN OPPOSITION

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Continuation of Title Page

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

STAN SKOKO, RALPH GROENER (Successor to Thomas Telford) and ROBERT SCHUMACHER, Board of County Commissioners, on behalf of CLACKAMAS COUNTY, OREGON, a Political Subdivision of the State of Oregon,

Petitioners,

v.

CECIL D. ANDRUS (successor to Thomas Kleppe), SECRETARY OF THE INTERIOR OF THE UNITED STATES, and W. MICHAEL BLUMENTHAL (successor to William Simon), SECRETARY OF THE TREASURY OF THE UNITED STATES,

Respondents,

and

JEANETTE SIMERVILLE, LARRY CALLAHAN and DALE D. SCHROCK, Board of County Commissioners, on behalf of BENTON COUNTY, OREGON, et al,

Intervenors-Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1979

STAN SKOKO, THOMAS TELFORD and ROBERT SCHUMACHER, Board of County Commissioners, on behalf of CLACKAMAS COUNTY OREGON, A Political Subdivision of the State of Oregon,

Petitioners,

v.

CECIL D. ANDRUS (successor to Thomas Kleppe) SECRETARY OF THE INTERIOR OF THE UNITED STATES, and W. MICHAEL BLUMENTHAL (successor to William Simon) SECRETARY OF THE TREASURY OF THE UNITED STATES,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR INTERVENORS-RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

The questions presented by the Petitioners are not properly raised by this case. The true questions presented

are:

"1. Does the lower Court have jurisdiction over the subject matter, or is the relief sought a matter of concern of the Court of Claims?

"2. Whether plaintiffs' Complaint states a claim upon which relief can be granted, namely, whether the plaintiff, Clackamas County, plus seventeen other Western Oregon Counties are entitled to a fund certain and that said funds should be paid out by the Secretary of the Treasury and Secretary of the Interior, pursuant to Title II of the McNary Act of 1937 (50 Stat. 874)."

ARGUMENT

Intervenors would make this key point: Both the opinion of the 9th Circuit Court of Appeals and the questions presented by petitioners are far afield of the issues on appeal.

The question before this court does <u>not</u> involve the sovereign rights of the state of Oregon, nor the powers of

the Congress over the O & C lands and revenues, nor the title to the lands, nor any other such question.

No such issues were before the courts below.

Petitioners did not seek to enforce any sort of interest in the lands, nor did they challenge the authority of Congress to legislate with regard to revenues from the lands. Rather than <u>challenging</u> the legislation, they sought to <u>enforce</u> it as they interpreted it. Their action was based solely on the McNary Act, and they prayed for payment of millions of dollars claimed due under the provisions of that Act.

The District Court of Oregon held that it lacked jurisdiction over money claims against the federal government in that amount. Accordingly, it dismissed and denied petitioner's motion

for summary judgment. On appeal to the 9th Circuit Court of Appeals, petitioners correctly stated the questions as follows:

> "1. Does the lower Court have jurisdiction over the subject matter, or is the relief sought a matter of concern of the Court of Claims?
>
> "2. Whether plaintiffs' Complaint states a claim upon which relief can be granted, namely, whether the plaintiff, Clackamas County, plus seventeen other Western Oregon Counties are entitled to a fund certain and that said funds should be paid out by the Secretary of the Treasury and Secretary of the Interior, pursuant to Title II of the McNary Act of 1937 (50 Stat. 874)."

The Court of Appeals affirmed the Oregon District Court. However, in so doing, it issued an opinion going far beyond the questions of jurisdiction and statutory interpretation. The Court stated:

> "However, there is nothing in the Revestment Act nor in subsequent acts nor in the decisions of the Supreme Court that purports to subject the lands to a trust in favor of the Oregon counties, or to create a contract between Congress and the counties entitling the latter to any monies from the fund. Title to the revested lands was established in the United States, subject to no restrictions, covenants or conditions whatever. The lands became part of the public domain* * *." See petitioner's Ab 26.

The court also said that the O & C lands were "exclusively the property of the United States," that "Congress could amend or repeal the act in question without infringing any right of the counties" and that the counties had "no rights. . . to the continuance of Congress' bounty."

The question of the counties' rights <u>apart from the provisions of the McNary Act</u> have never been litigated. It is true that the various briefs filed by

petitioners in this action contain many references to "the sovereign rights of the state of Oregon," the "beneficial interest" of the counties and lands, etc. However, these questions have never been properly before any court. They have not been the subject of testimony, evidence, adversary briefing or adversary argument.

These questions remain open.

It is unfortunate that the 9th Circuit Court of Appeals chose to depart from the issues before it and to issue dicta on matters of such potential significance. However, on the issue before it, the court correctly affirmed. The District Court for the District of Oregon lacked jurisdiction even to entertain this case, let alone to issue summary judgment for petitioners. That point, and that point alone, is determinative of this petition for certiorari. The

questions presented by petitioners in their petition should be resolved only when they are litigated.

CONCLUSION

For the foregoing reasons, intervenors-respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of August, 1979, I served the within Brief upon Donald C. Walker, Kenneth E. Shetterly, attorneys for petitioners, and on the Solicitor General Department of Justice, Attorney for Respondents, by mailing three certified true copies of same to each, by depositing in the United States Postoffice at Portland, Oregon, a full, true and correct copy thereof, with postage prepaid thereon addressed to:

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79-197

Supreme Court, U. S.
FILED
OCT 17 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court
of the United States

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PETITIONERS' REPLY TO RESPONDENTS' SECRETARIES' BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO RESPONDENTS' SECRETARIES' BRIEF IN OPPOSITION

STATEMENT ADDITIONS

On page 6 of the Secretaries' brief the following statement is made: ". . . Faced with the prospect that the full 75 percent might go to the counties, and concerned that the 75 percent share *was overly generous*, Congress reviewed the distribution scheme."

The reference to "overgenerosity" also is taken out of historical context.

The facts are as follows: In 1952 the formula was distributed 75-25% in accordance with Title II of the McNary Act.

In 1953, the timber cut was not enormous and there was a desire to open up some of the O&C forest land and the need was for the building of the Smith River Road in Southern Oregon.

The cost of this road was not affordable out of the fourth 25 percent; hence, the then Congressman Henry Jackson and others objected to an appropriation out of the general treasury because of the "inordinate" amount the counties were receiving as contrasted to national forest lands (25 - 75% in favor of the Federal government).

Consequently the first appropriation bill was to finance the $2,700,000 Smith River Road project out of the general fund and make it a reimbursable item.

This practice was continued on a specific project basis until 1960 when the entire third 25 percent was appropriated and made a reimbursable item.

Now, here is what the Secretaries *are not* telling the Court. After appropriating the third 25 percent, the Secretaries are using the third 25 percent as the main source for administration and using a smaller and only a nominal amount of the fourth 25 percent. This is a major policy change and accomplished by silence and implication.

It is circumvention of the law at its worst.

For example, in 1977 the total of the receipts was

$212,090,848. The counties received 50 percent, or $106,045,424. The next, or third 25 percent, of $53,-022,712 was used for roads, improvements (administration), and only $2,153,880 was spent out of the fourth 25 percent for administration. This unfair practice has been followed annually before and after.

The McNary Act, 50 Stat. 874, provides for administration and that is supposed to be out of the fourth 25 percent. Administration of the O&C lands encompasses road improvements and the entire expense of managing these lands.

What the Secretaries are wrongfully doing is piling up a surplus by not spending the fourth 25 percent for administration—using the third 25 percent for administration, and then refusing to take the surplus of the fourth 25 percent as paragraph C of Title II states and charge it off against the reimbursable item. If paragraph C was followed, everything would be fair and correct, namely, that the fourth 25 percent would bear the burden of management. If the fourth 25 percent was insufficient and more was needed to manage the lands, it would be handled by the reimbursable item that the Act provides.

It should be remembered that the O&C lands are self-supporting and not a burden on the U.S. Taxpayer.

Why is it then that the Secretaries should misconstrue the appropriation bills and by doing so give the federal government a large profit on lands that are sovereign to Oregon? It violates the principle of dual

sovereignty, and for the Solicitor to say there is "no merit to our argument," he has to ignore the definition of "absolute title"; he has to ignore the sacred fundamental of dual sovereignty and he has to ignore the historical sequence of events that has made this problem so unique.

Its uniqueness deserves unique treatment, especially when all Clackamas County is asking is that our basic Constitutional and legal fundamentals prevail.

The gist of the matter is that the United States Supreme Court case *U. S.* v. *O&C R.R. Co.*, 238 U.S. 393 at 434 declared that *absolute title* was in the Railroad and such declaration reversed the condition subsequent and reverter decree of the lower court. This Court then required that the Railroad carry out the intent and purpose of the original granting Acts by enforcing the covenant that the lands be available to settlers rather than timber speculators.

It was this provision of the Decree that was the basis of the Chamberlain-Ferris Act. Certainly Congress could not go beyond the court decree which means that the 1916 "revestment" act was within the spirit of the court decree and not in defiance of it. Consequently the revestment was for a limited purpose and not to place the lands back in the public domain and defeat Oregon's sovereignty that had already attached.

The next milestone is the McNary Act of 1937 that for the first time changed the policy of the original granting acts by providing for substantial yield of the lands rather than settlement.

To be fair it was necessary to recognize Oregon's unique status in the lands; hence, the unusual formula.

Now, the Secretaries are attempting to take advantage of the appropriation bills by construing them in such a manner that the Oregon Counties are deprived of timber revenues that justly belong to them.

The Solicitor shockingly and without authority states there is no merit to our contention of state sovereignty. Such a remark is tantamount to denying the novel constitutional principle of dual sovereignty.

This unique fundamental of our constitutional system was early recognized by de Tocqueville, one of the most astute scholars of our Constitution, who said about dual sovereignty that it was based "upon a wholly novel theory which may be considered a great discovery in modern political science. . . ."

Previous to our adoption of the Constitution, no government had thought it possible to divide sovereignty. The great experiment has worked. Modern conditions have threatened its existence due to the present day tendency toward centralization.

Nowhere in American history will this issue be in greater focus or confrontation than exists in this present case.

The wrongful construction of the appropriation bills will have the effect of destroying this unique balance of separate spheres of national and local governments.

The creation of such a novel system is one of the great achievements in the political history of mankind and its perpetuation by judicial protection will be an equal achievement.

Therefore, constitutional fundamentals are an important tool in statutory construction. These tools have not been used.

ANSWER TO ARGUMENT

Appropriation Bills as Construed by Secretaries Is Deception.

On page 8 of the Secretaries' brief they make the following statement: "Congress has thus decided that the O&C Counties are to receive 50 percent of the annual revenues, not 75 percent; the 25 percent share that the counties do not receive directly is allocated to maintaining and improving the O&C lands."

The substantive law (McNary Act, supra) clearly earmarks the fourth 25 percent for administration. The appropriation bills do not eliminate this duty. For Congress to do what the Secretaries claim, they would have to have a substantive amendment to eliminate Paragraph C and that cannot be done by a silent appropriation bill that says nothing about removing the obligations of Paragraph C as to handling any surplus.

The sad part of this long saga is that Congress was advised by the Secretary of Interior of the need of specific projects over and above the fourth 25 percent and these appropriation bills were a vehicle to accomplish that purpose. This was the practice from 1953 to 1960.

From 1960 on, the improper practice has been carried on.

The argument is made that if Congress wanted the fourth 25 percent to be used for administration, it would have so provided (page 9).

Paragraph C of Title II very clearly states: (C) "25% to be available *for the administration of this Act*, in such annual amounts as the Congress shall from time to time determine."

A fair reading of Title II read in conjunction with Title I clearly reveals how the first 75 percent is to be allocated. Nothing in the 75 percent is for administration; then the fourth 25 percent is allocated for that purpose.

This is not an ordinary law. It does not effect the rest of the nation. It is not a general law, but a law that was the outgrowth of the 1915 Supreme Court decision.

To emasculate that law by a silent appropriation bill certainly is not what Congress intended.

The argument is much stronger that if Congress wanted to eliminate the surplus provision of Paragraph C, it would have done so *expressly* and long ago.

That portion of Paragraph C reads as follows: "Any part of such percentum (fourth 25%) not used for administration purposes shall be covered into the general fund of the Treasury of the U. S. *PRO-*

VIDED, that moneys covered into the Treasury in such manner shall be used to satisfy the reimbursable charges against the O&C land grant fund mentioned in subsection (b) so long as any such charges shall exist."

Anyone can read every annual appropriation bill from 1953 through 1979 and not find one such appropriation bill that eliminates the responsibility of Paragraph C—*the surplus* still has to be charged off against the reimbursable item of paragraph B.

Secretaries Should Not Impute Bad Faith to Congress

For the Secretaries to say that Congress intended Paragraph C to be eliminated by silent appropriation bills is to impute to Congress a deceptive and unconstitutional intent.

The Congress was led to believe that the fourth 25 percent was insufficient to handle the expense of administration.

Would it be reasonable to believe that if Congress intended to change the substantive formula of the Act that it would do it by circumvention of passing annual appropriation bills, and not do it in an open and honest fashion of holding hearings on the substantive Act? Clackamas county refuses to believe that the Congress would conduct such an important matter in such a shabby matter.

Past Record No Help to Secretaries

On page 10 of their brief the Solicitor General states, ". . . By its successive reenactment of the proviso language with knowledge of this interpretation, Congress has implicitly ratified respondent's construction of the statutory scheme and their method of distribution. . . ." Citing case and the language of the *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 at 381 (1969) states: ". . . unless there are compelling indications that it is wrong."

Here there are overwhelming reasons why serious error is being committed. Error is that the Secretaries and Congress neither have the right to interpret or ratify an appropriation bill that diminishes the sovereignty of Oregon.

The Solicitor cites *Red Lion Broadcasting*, supra, and *Boesche* v. *Udall*, 374 U.S. 472 (1963).

Both of these cases are situations where the federal government has the right to regulate. The *Red Lion* case has to do with FCC matters and the "fairness doctrine" and the *Boesche* case deals with mineral leases on public lands.

These are O&C lands with vested Oregon rights and are NOT part of the public domain. Citing the passage of years as a basis for their construction gives them no aid. Just like a court that never had jurisdiction in the first place, subsequent orders and decrees can have no meaning. They have been divested from the U.S.—Oregon sovereignty attached—they were on Oregon's tax rolls. There has been no purchase, no

condemnation, no ceding. How, under our system of dual sovereignty can the federal government retake land by an Act of Congress, and more shockingly, by the wrongful construction of a silent appropriation bill?

To amend the McNary Act by implication or silence runs contra to every case cited and particularly the *TVA* v. *Hill*, 437 U.S. 153 (1978) and *City of Los Angeles* v. *Adams*, 556 F.2d 40 which corroborates Clackamas County's position and not the Secretaries.

Definition of Terms

ABSOLUTE TITLE. Black's Law Dictionary defines "absolute title" as follows: "As applied to title to land, an 'absolute' title means an exclusive title, or at least a title which excludes all others not compatible with it; an absolute title to land cannot exist at the same time in different persons *or in different governments. Johnson* v. *McIntosh*, 8 Wheat. 543, 588, 5 L. Ed. 681."

SOVEREIGN RIGHT. "A right which the state alone, or some of its governmental agencies can possess, and which it possesses in the character of a sovereign for common benefit and to enable it to carry out its proper functions; distinguished for such 'proprietary' rights as a state, like any private person, may have in property or demands which it owns." Black's Law Dict. Third Ed., p. 1643, also *St. Paul* v. *Chicago R. Co.*, 45 Minn. 387, 48 N.W. 17.

McCulloch v. Maryland, 17 U.S. 315 Supports Dual Sovereignty

Oregon's position of sovereignty is strongly supported by the straightforward language of *McCulloch* v. *Maryland.* Chief Justice Marshall, on page 410, states: "In America, the powers of sovereignty are divided between the government of the union and those of the states. *They are each sovereign with respect to the objects committed to the other.*" Title to O&C lands being in a private party commits them to state sovereignty. (Best Evidence: O&C lands for years were on the Oregon tax rolls.)

The Secretaries' argument never came face to face with basic fundamentals of the O&C history. What did they ignore?

1. They ignore 238 U.S. 393, at 434, where this court said "absolute title" was in the O&C R.R. Co., a private party. This court had just reversed the lower court where a condition subsequent was declared and the resulting reverting of these lands to federal government. This court said *No* (1915), and the lands did not revert. That rule has never been changed. When absolute title is declared, the incident of state sovereignty also attaches and cannot be rendered asunder merely by an Act of Congress and certainly not by a silent appropriation bill.

The anomaly that follows occurred in 1916 (Chamberlain-Ferris Act). 39 Stat. 218. The Railroad Co. had violated an enforceable covenant (not condition subsequent) and to correct this breach the U. S. Su-

preme Court stated, 238 U.S. 393 at 437, either Congress must remedy the breach or the local District Court would do so.

The anomaly is that the Chamberlain-Ferris Act, supra, was called the "Revestment Act" and the land was transferred back to the U.S. government. But for what purpose? NOT to put it back in the public domain, but for the General Land Office to have title so it could convey to settlers. The intent was to carry out the purpose of the original granting acts and not to defeat them.

The Secretaries and the Solicitor are allowing the passage of time to dull the memories of the true intent of this court's opinion.

2. They ignore the historical change of policy in the McNary Act that changed the policy of settlement of lands (Granting Acts) to sustained yield. This policy change recognized the unique status of these lands and consequently the unique formula of 75-25 percent.

O&C Issue Is Festering

The O&C issue for years has been kept in the dark. High school and college history books are strangely silent on this 113 year vital-to-Oregon body of knowledge. Our congressmen and senators stand mute. Senator Robert Packwood was quoted, in the Medford Mail Tribune, as saying, "The less said about O&C, the better." Congressman Robert Weaver has said, in

the Portland Oregonian, "Don't rock the boat or the Eastern congressmen will take it away from us."

These are statements of fear and expediency. None has ever said these lands do not belong to Oregon. In fact they all admit it, but they lack confidence that law and justice will prevail.

More and more articles are appearing in Oregon's newspapers, many letters to the editors and telecasters have been talking about the O&C lands. The people are now awakening and know that this problem has been shockingly and shamefully mishandled throughout the years by political leaders' acquiescence or lack of knowledge of the subject.

It is not healthy for the Union to have one of its sister states feel so aggrieved.

Some Oregon political leaders are standing up. The then Secretary of State, and now State Treasurer (See. Pet. App. U), the Clackamas County Commissioners and others, and the number is growing and the public is now realizing the grave errors of the past. The judge in the District Court indicated the fairness of Clackamas County's contentions when he stated, Tr. 73:

> "I think many fairminded people may agree with Mr. Walker and that if jurisdiction was not a hurdle and simple fairness was the only test I need apply, he might well carry the day. . . ."

The magnitude and concern of this issue deserve a full hearing. The rights are by law established. Only the judiciary can unscramble the chaos that presently exists.

Authorities of Solicitor More Helpful to Clackamas County

First: The Solicitor cites *City of Los Angeles* v. *Adams*, and *TVA* v. *Hill* as authorities that appropriation bills can amend substantive legislation. The language of these cases is forceful that appropriation bills *cannot*, by implication, accomplish that result.

Second: The authorities of *Red Lion Broadcasting Co.* v. *FCC, supra*, and *Boesche* v. *Udall, supra*, are far removed from our fact situation. The "passage of time" argument is of no consequence as stated on p. 381 of the *Red Lion* case "unless there are compelling indications that it is wrong." Reclaiming state sovereignty is that type of compelling indication.

Third: The cases supporting acquisition of property by the U. S. are not in point. The Solicitor cannot point to any such "acquisition" as the O&C lands and establish valid title in the U. S.

Fourth: The Solicitor cites the basic case of *U. S.* v. *O&C R.R. Co., supra*, and *O&C R.R. Co.* v. *U. S.*, 243 U.S. 549, for the proposition that all the federal government had to do was to secure the railroad full value of the grant. Such a cursory glance at those cases is extremely misleading. The first case establishing the proposition of "absolute title" and the ensuing incidents of sovereignty inure to Oregon. The second case was between the government and the Railroad and does not resolve the question of Oregon's sovereignty over these lands.

An opportunity to fully examine all authorities

cited will weigh heavily in favor of Clackamas County. Starting with constitutional principles and extending through statutory construction arguments will reveal logic and consistency in favor of Clackamas County's contention that these appropriation bills do not destroy the viability of Paragraph C, Title II. It still works.

Secretaries Ignore Legislative History

Even though the language of Title II, and particularly paragraph C, is plain and unambiguous there is an abundance of legislative history that reflects the state of mind of Congress.

The McNary Act was the outgrowth of a long and unique federal-state problem.

Hearings Before Committee on Public Lands, 64th Congrss, February 17, 1916-March 14, 1916.

Hearings Before Committee on Public Lands, H.B. 5858, 75th Congrss, April 13, 1937.

Hearings Before Committee on Public Lands, 78th Congress, May 6-7, 1943; U.S. Senate R-1011, R-132-156.

Hearings—Sub-Committee of the Senate Appropriations on SR 7176, 82nd Congress, 2nd Session, April 16-May 16, 1952, p. 1543.

Just a sampling will show the thinking of those times.

Also see remarks of Guy Cordon (later U. S. Senator Cordon), and one of the chief contributors of the

McNary Act, at App. O, of Petition for Certiorari, page 74. Also see App. N, and App. F, (Congressman Mott).

Proof Positive of Legislative Intent

The Solicitor General, in his argument, has contended that the legislative history favors the Secretaries' construction of the present procedures. As previously stated, the appropriation bills started in 1953 and nothing could be more clear than that we will now present in this brief to show what the intent was of the original appropriation bill and that language has been unchanged throughout the years.

See Hearings Before the Senate Subcom. of the Comm. on Appropriations, 82nd Cong., 2d Sess., p. 1533 (1952). Senator Cordon (chief architect) then proposed an amendment which is the basis of the present lawsuit, and this is agreed to by the defendants in the original record, R. 53. (Smith River Road)

Senator CORDON. . .

> "I believe, Mr. Chairman, that we would maintain our policy as it stands and that *would fit* the repayment of this access road money *into the present pattern* of this legislation and more logically in lieu of it, I suggest we use this language, and I am only reading the last proviso.
>
> *Provided further;* That said sum of $2,750,000 is hereby made a reimbursible charge against the Oregon and California land-grant fund and shall be reimbursed to the general fund in the Treasury in accordance with the provisions of the second paragraph of subsection (b) of title II, of the act of August 28, 1937 (50 Stat. 875).

> That language substituted for this would provide the whole of the access roads and provided for in this appropriation should be a charge against that second 25 percent of receipts. *It would mean so far as the Government is concerned that the counties from their 75 percent would be paying the whole of the access roads.* It would mean so far as the Government was concerned that the money would be paid back I think within the year because *within that 25 percent there would be more than enough to pay that all back.* . . .
>
> Mr. Chairman, to me it is a sound approach. It does not require any new accounts. *It does not require any new procedure. The procedure is set up now under existing law.* The O. & C. fund must remain in existence. Here we would have a capital investment on account of the lands *charged in as were the other capital investments,* including the one by which the lands were bought. . . ." *Id.* at 1543-44.

The above statement by Senator Cordon reflects the following:

(1) That we would maintain our policy as it stands. (Paragraph C is part of that policy.)

(2) And that would fit the repayment of this access road money into the present pattern of this legislation. (The present pattern is paragraph C.)

(3) It does not require any new procedure. The procedure is set up under existing law. (The existing procedure is paragraph C, both in 1953 and continuing throughout all the years.)

(4) Here we would have a capital investment on account of the lands charged in as were the other capital investments, including the one by which the lands were bought. This language is conclusively clear that the appropriation bill fitted into the existing pattern and procedures, and these procedures are the ones that are being avoided and not followed by the Secretaries.

Senator Guy Cordon's remarks completely corroborate our contention that any *new* reimbursible item created by an appropriation bill fits into the existing machinery of Title II, and Paragraph C is part of that existing machinery.

Duty of All Counsel

Our system of justice is based on the advocacy system. Most cases involve economic problems and often obscure or technical rules of justice, but this one is different. It brings into the judicial arena a monumental confrontation that tests whether the constitutional fundamentals will work. It tests whether the federal-state relationship is really based on dual sovereignty, or whether sheer political power can overrun a state and county's rights.

No counsel, regardless of which side he represents, has the right by advocacy to destroy that precious balance of the Constitution that brings the Union into being and hopefully perpetuates such a great system.

Some of the counties oppose Clackamas County as they did unsuccessfully 25 years ago. They should be

reminded of Jefferson's thought that the truth may well come from the minority as well as from the majority.

Clackamas County will rest its case on the underlying principles of the United States Constitution and basic rules of statutory construction. The Solicitor General, by refusing to accept the doctrine of dual sovereignty, is in serious error.

CONCLUSION

The unique and novel questions presented in the O&C case are highly important, both to Oregon and the federal government.

1. *Past:* Rights have accrued where non-discretionary sums are due the 18 O&C Counties.

2. *Future:* Growing differences of opinion will continue to create an unhealthy atmosphere between Oregon and the federal government. A definite answer based on legal and constitutional principles will restore harmony rather than discord.

The spirit of the UNION will be served by a full hearing.

Respectfully submitted,

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Supreme Court, U. S.
FILED
SEP 18 1979
MICHAEL RODAK, JR., CLERK

79-197

In the Supreme Court of the United States

October Term, 1979

STAN SKOKO, RALPH GROENER and ROBERT SCHUMACHER, Board of County Commissioners, on behalf of CLACKAMAS COUNTY, OREGON, a Political Subdivision of the State of Oregon,

Petitioners,

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR OF THE UNITED STATES, and W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY OF THE UNITED STATES,

Respondents,

and

JEANETTE SIMERVILLE, LARRY CALLAHAN and DALE D. SCHROCK, Board of County Commissioners, on behalf of BENTON COUNTY, OREGON, et al,

Intervenor-Respondents.

PETITIONERS' REPLY TO INTERVENORS-RESPONDENTS' BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO INTERVENORS-RESPONDENTS' BRIEF IN OPPOSITION

The intervening defendants, by their acquiesing to the practices of the Secretaries and not asserting Oregon's basic legal rights in the O&C lands, have sadly painted themselves into a very uncomfortable corner.

They have joined the federal defendants in this

suit just as they did unsuccessfully 25 years ago in opposing Clackamas County's position on the O&C lands. Now that the Ninth Circuit has erred seriously in pronouncing federal ownership over these lands, they belatedly realize they have an opinion that is impossible to live with.

The Ninth Circuit has said that the federal government has absolute ownership of the O&C lands. The intervenors, by claiming that is not an issue in this case, are attempting to isolate a constitutional fundamental of dual sovereignty from being used as an aid to statutory construction.

STATUTORY CONSTRUCTION

In their brief, they protest that the sovereign rights contention is not an issue, but only statutory construction of the McNary Act is at stake. Clackamas County is challenging the erroneous construction of the appropriation bills in reference to the McNary Act, and in so doing have consistently pointed out the ordinary rules of construction:

(1) Appropriation bills cannot amend substantive legislation by implication or silence. *Langston* v. *U.S.*, 118 U.S. 389 at 393.

(2) Congressional history is important to show legislative intent;

(3) AND MOST IMPORTANT Tool of Construction: Where land has been divested from the federal

government and absolute title in a private party (the O&C Railroad Co.) 238 U.S. 393, at 434, then the sovereignty of Oregon attached and that sovereignty cannot be terminated or alienated by an Act of Congress. Applying the fundamentals of state sovereignty avoids an undesirable and unconstitutional construction.

It begs the question to say that the State of Oregon could challenge the question of sovereign rights, but when a subdivision of that sovereign, Clackamas County, urges that argument in the proper construction of the McNary Act, that the court should ignore such an important constitutional argument. Appropriation bills, wrongfully construed, cannot on appeal ignore historical and constitutional arguments that assist the court in the valid construction that harmonizes the substantive legislation with the appropriation bills. To not do so allows the appropriation bills in essence to become the substantive legislation by implication or silence.

The understanding of the O&C history clearly brings into focus the original intent of the granting acts and how that intent was perpetuated through historical changes that were recognized in the *U.S. v. O&C R.R. Co.*, supra, Chamberlain-Ferris Act, 39 Stat. 218 McNary Act, 50 Stat. 874, and *Clackamas County* v. *McKay*, 219 F.2d 479.

The passage of time should not dull these legal landmarks.

AUTHORITIES ON CONSTRUCTION BACK UP CLACKAMAS COUNTY

Clackamas County has consistently cited *Langston* v. *U.S.*, supra which is a time-proven case declaring that appropriation bills cannot amend or repeal substantive legislation by implication. However, there is abundant authority in recent days which proclaims even more forcibly the same doctrine. See *T.V.A.* v. *Hill*, 437 U.S. 153, 98 S. Ct. 2279, at page 2299 (1978):

> "*The doctrine disfavoring repeals by implication 'applies with full vigor when . . . the subsequent legislation is an appropriations measure.'* Committee for Nuclear Responsibility v. Seaborg, 149 U.S. App. D.C. 380, 382, 463 F.2d 783, 785 (1971) (emphasis added); Environmental Defense Fund v. Froehlke, 473 F.2d 346, 355 (CA 8, 1972). This is perhaps an understatement since it would be more accurate to say that the policy applies with *even greater force* when the claimed repeal rests solely on an appropriations act. We recognize that both substantive enactments and appropriations measures are 'acts of Congress,' but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. Not only would this lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need. House Rule XXI (2), for instance specifically provides:
>
> 'No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works as are already in progress. *Nor shall any provisions in any such bill or amendment thereto changing existing law be in order.*' (Emphasis added.)

See also Standing Rules of the Senate, Rule 16.4. Thus, to sustain petitioner's position, we would be obligated to assume that Congress meant to pro tanto repeal § 7 of the Act by means of a procedure expressly prohibited under the rules of Congress."

In reference to intervenors' contention that the question of dual sovereignty is not an issue, see 73 Am. Jur. 2d, § 275, at page 441, STATUTES:

> ". . . As in the case of all statutes, such interpretation should be adopted as will have due regard for, be in harmony with, and give effect to, the legislative intent."

See *U.S.* v. *Raynor*, 302 U.S. 540, 82 L. Ed. 413, 58 S. Ct. 353, rehearing denied 303 U.S. 665.

See also the statutory rule that undesirable consequences should be avoided.

See also 73 Am. Jur. 2d, § 258, page 427:

"It is generally regarded as permissable to consider the consequences of a proposed interpretation of a statute, where the act is ambiguous in terms and fairly susceptible of two constructions. Under such circumstances, it is presumed that undesirable consequences were not intended; to the contrary, it is presumed that the statute was intended to have the most beneficial operation that the language permits. . . ."

Diminishing Oregon's sovereignty is an undesirable result. The impairment of one state's rights is the seed of destruction to all.

Clackamas County believes that the appropriation bill is clear and that it does not in any way repeal, modify or amend paragraph (c), Title II of the McNary Act. However, if such an ambiguity does exist, then the rule just stated would be applicable, namely, that an appropriation bill should not be allowed to defeat a constitutional principle.

See also 73 Am. Jur. 2d, § 396, page 511, JUDICIAL POLICY:

"Repeals by implication are not favored. Thus, an an intent to repeal by implication, to be effective, *must appear clearly, manifestly, and with cogent force.* . . . Moreover, if two constructions are possible, that one will be adopted which operates to support the *earlier act* rather than to repeal it by implication."

See *U.S.* v. *Jackson*, 302 U.S. 628, 82 L. Ed. 488, 58 S. Ct. 390,

where the court stated that it would not hold to repeal if they can find reasonable ground to hold the contrary.

ANALYSIS OF McNARY ACT

Title II of the McNary Act (50 Stat. 874), is the substantive legislation that provides the formula for the distribution of the O&C funds. There are three paragraphs:

(a) 50% to Counties;

(b) 25% to Counties unless there are reimbursable charges against fund due U.S. (Appropriation bills are reimbursable items);

(c) 25% to be available to administer the act. Any part of this fourth 25% not used for administration can be covered into general fund provided there are no reimbursable charges against the fund mentioned in (b) above.

The appropriation bills by express terms have appropriated a sum equal to the third 25% and made such an appropriation a reimbursable charge.

The appropriation bills do not eliminate the procedure of paragraph (c). It is still the substantive legislation. The Secretaries have a duty to obey this unchanged provision.

The Secretaries have for years disregarded paragraph (c) and have horizontally placed the surplus of the fourth 25% (par. c) into the general fund. The duty is to vertically take the surplus, through para-

graph (b), and first reduce the lien charges. By doing so, the surplus reduces the reimbursable charges, thereby freeing most of the third 25% for the Counties.

The honor of the United States is at stake. To improperly administer the fund, when there is not one penny's discretion, is to run roughshod over the rights of Oregon. The basic fundamental that recognizes dual sovereignty is one of the unique features of our great constitutional system that unites the sister states. To say that the principle is outside the issue of statutory construction is to reveal a callousness toward the principles of the UNION.

The Union will be upheld by adhering to this standard.

EARLIER CLACKAMAS COUNTY CASE SOUND PRECEDENT

The Intervenors neglect to cite *Clackamas County* v. *McKay*, 219 F.2d 479 (1954). This important case has great similarity to the legal issues of the present case.

On page 481 of that opinion, the court starts by saying:

> "This is a civil action brought in the U.S. District Court by Clackamas County on behalf of itself and 17 other so called land grant counties . . . seeking mandamus directed to the Secretary of Interior and Agriculture.
>
> "The controversy concerns the proceeds from the sale of timber from 472,000 acres of public land."

Mandamus was allowed, the relief granted, jurisdiction assumed and most of the arguments asserted here by the defendants were asserted there.

Just to clearly emphasize the similarity, *our* case reads as follows:

> "This is a civil action brought in the U.S. District Court by Clackamas County in behalf of itself and 17 other so called land grant counties seeking mandamus directed to Secretary of Interior and Secretary of Treasury.
>
> "The controversy concerns the proceeds from the sale of timber from 2.5 million acres of O&C lands."

Absolutely no difference in any legal sense. If mandamus was the correct procedure then, it is the correct procedure now. The 1954 case was compiled with by the Secretaries and the appeal to the U.S. Supreme Court was held moot because of this compliance.

It is truly incredible that the Intervenors ignore this "on all fours" case and quibble over jurisdiction and statutory construction. Could it be fear of reprisal from the federal government?

Another important case in this long controversy that is very supportive of Clackamas County and which the Intervenors strangely ignore is *Lafferty* v. *Humphrey*, 248 F.2d 82. At page 82 Judge Prettyman stated:

> "In our opinion and decision in that case (219 F.2d 479) we held that acts of Congress in 1916 and 1937 (McNary Act) imposed upon the various ex-

ecutive officials involved a mandatory duty to distribute to the Oregon counties the money accumulated in the special fund designated 'The Oregon and California land-grant fund'. We ordered a remand for proceedings in accordance with that view. That was on April 30, 1954."

The court has not only stated, but reiterated that mandamus is the proper procedure in the O&C fund cases.

COURT HAS MANDAMUS JURISDICTION

The Intervenors also would prefer this to be resolved purely on a jurisdictional issue. This is a mandamus suit.

See 28 U.S.C. § 1361, page 24:

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to plaintiff."

Again the Intervenors ignore the mandamus jurisdictional points of *Clackamas County* v. *McKay*, 219 F. 2d 479, where Clackamas County prevailed in a fact situation where the Secretaries failed to make the proper distribution. All the points of opposition that are asserted against Clackamas County now were asserted in that case:

(1) Sovereign immunity;

(2) Lack of mandamus jurisdiction;

(3) Federal government's claim of ownership.

There is ample authority for mandamus jurisdiction. See:

State Highway Comm. of Missouri v. *Volpe*, 347 F. Supp. 950 (1972);

U.S. v. *Commonwealth of Pennsylvania*, 394 F. Supp. 261 (1975) Aff. 533 F.2d 107 (1976);

State of Minnesota v. *Weinberger*, Sec. of H.E.W. 359 F. Supp. 789 (1973).

These cases support the provision that mandamus jurisdiction was allowed to enforce nondiscretionary duties of the Secretaries. The same defenses of the Court of Claims, sovereign immunity, citing the *Carter* v. *Seamans*' rule, and the Tucker Act, were all declared not to be applicable to this type of action.

In the *Commonwealth of Pennsylvania* case, on page 266, the court states:

"The implicit substance of the federal government's argument is that even if all the elements of mandamus were established, the writ could not issue merely because the duty owed involved government funds. This court finds no support for such reasoning either in logic or the case law."

For the Intervenors not to take comfort in the basic authorities which have been cited and where they can make absolutely no distinction corroborates the proposition that they are operating in an atmosphere of fear and not basing their defense on logic, legal reasoning or constitutional principles.

Clackamas County is only a small county and political overtones and political expediency have come close to drowning out the cries for legal and constitutional redress to an issue with great magnitude that involves the federal and state relationship.

OTHER RELIEF DOES NOT PRECLUDE BASIC RIGHTS

The fact that Oregon can challenge the entire structure of the federal government's administering the O&C lands does not prevent Clackamas County from asserting those same basic and sound principles in a mandamus suit where the Secretaries are wrongfully construing the appropriation bills in reference to the McNary Act. The appropriation bills do not amend, modify or eliminate the machinery of paragraph (c) of Title II of the McNary Act.

Paragraph (c) reads:

> (c) "Twenty-five per centum to be available for the administration of this Act, in such annual amounts as the Congress shall from time to time determine. Any part of such per centum not used for administrative purposes shall be covered into the general fund of the United States. *Provided: That moneys covered into the Treasury in such manner shall be used to satisfy the reimbursable charges against the Oregon and California* land-grant fund mentioned in subsection (b) so long as any such change shall exist."

And by allowing paragraph (c) to be eliminated by silence is depriving the eighteen O&C Counties many millions of dollars to which they are justly entitled.

O&C ISSUE OF GREAT MAGNITUDE

Past constitutional history reveals cases that had great precedent in the evolution of our constitutional system.

1803—Marbury v. Madison—Supreme Court ruled a law of Congress void.

1819—Dartmouth College case—corporation charter deemed a contract and impairment disallowed.

1819—McCulloch v. Maryland—State could not impair by taxation a federal function.

1824—Gibbons v. Ogden—Federal government to regulate interstate commerce.

1866—Ex parte Milligan—Rejection of military tribunals in regions where civilian courts existed.

To add to that list, Clackamas County v. Andrus, et al would be a constructive milestone and the enunciated and reaffirmed principle that would safeguard the Union would be "*that land once divested from the federal government and in title in a private party is subject to state sovereignty and cannot be recovered into the public domain by an act of Congress* and certainly the rights of the state cannot be diminished by an appropriation bill that attempts to repeal substantive legislation (Title II, par. (c) of the McNary Act) by implication.

RECORD OF INTERVENORS
ASSOCIATION OF O&C COUNTIES

The Intervenors represent fifteen counties of the eighteen, plus the Association of O&C Counties, which also has intervened as a party.

The Intervenor Association of O&C Counties is the quarterback for the remaining intervenors. It is interesting to note that none of the district attorneys for these counties, nor the county counsels, is speaking on their behalf on any particular whatsoever.

The Association of O&C Counties fought Clackamas County 25 years ago in the 1954 case and their failure to use the tools of that precedent to protect the rights of Oregon has to be one of the state's biggest riddles.

Intervenors' brief is mostly an argument supporting petitioner's cause. They also disagree with the Ninth Circuit's opinion declaring the federal government to be the owner of the O&C lands.

They urge that the questions of "soverign rights" and "beneficial interests" are not an issue in this case. They state that these matters "have not been the subject of testimony, evidence, adversary briefing or adversary argument."

These Intervenors, along with the Association of O&C Counties, moved for summary judgment. All the parties, plaintiff and defendant, stipulated before the court that it was submitted for final determination. By this Motion for summary judgment they concede that there are no genuine issues and the Complaint states

uncontroverted. An examination of the Complaint will reveal a detailed and historical sequence of events, both factual, including the statutes and prior judicial opinions. All of this leads to the point that the McNary Act has to be construed with its legislative and judicial past. If sovereign rights are involved, then that is an additional strong reason to urge such argument in the construction of the McNary Act and not, as the Intervenors suggest, to ignore it.

It is obvious that the Intervenors have a split personality. They agree with Clackamas County on sovereign rights, but still say that the Secretaries are construing the statutes correctly. They can't answer the point that the *appropriation bills cannot*, by implication, eliminate paragraph (c) of Title II of the McNary Act. Their two positions are contradictory. If one believes in the sovereign rights of Oregon, then to be consistent one would have to agree that the Secretaries cannot use the appropriation bills to place a surplus into the general fund of the United States. The substantive legislation states otherwise, as expressly provided in paragraph (c), Title II of the McNary Act.

The fact that the controversy rages is good cause for the U.S. Supreme Court to hear this case and to bring harmony to the federal-state relationship.

NINTH CIRCUIT DEFIES U.S. SUPREME COURT DECREE
238 U.S. 393, 434

The 1915 ruling states that title is absolute in a private party, O&C Railroad — hence, state sovereignty

attaches. The Ninth Circuit opinion declaring federal ownership is an absolute defiance of that ruling. The wrongful construction of the appropriation bills has the practical effect of assuming a proprietary interest in the lands by the federal government and such practice is a defiance of the court's ruling. This phase of this long Odyssey of events is an additional reason for this court to assume jurisdiction and to grant certiorari.

It is extremely important for this court to determine if its former Decree in 238 U.S. 393 is being defied by the two Secretaries. The 1915 Decree provides for absolute ownership in the Oregon-California Railroad Co., which ipso facto makes the land sovereign to Oregon. To disregard this fundamental makes it easy for the secretaries to assume improper control of the O&C lands and to give undue emphasis to the appropriation bills at the expense of ignoring the substantive legislation.

In the lower court, the Association and other Intervenors stated as follows: (R-70)

> "The appropriation bills may be 'erroneous' as plaintiffs allege, but the 'secretaries' duty is to obey them.
>
> "The State of Oregon may have certain sovereign rights in the lands beyond the power of Congress. Perhaps the beneficial title to these lands is in the State. A suit against the secretaries is clearly not the appropriate procedure for determination of any such rights, and plaintiffs do not seek to enforce any such rights."

It is truly curious that the Intervenors ignore the 1954 case of *Clackamas County* v. *McKay*, supra, when it has all kinds of ammunition beneficial to them and to Clackamas County. See *Clackamas County* v. *McKay*, supra, at page 496, paragraph XII:

> ". . . But when those duties were all completed, and at the end of the year a balance remained in the Oregon and California land-grant fund in the Treasury, the Secretary had no discretion as to his action. He was specifically and unequivocally directed by the Congress to cause the distribution of that balance according to the terms of the statute. That function of the Secretary fell within the line of cases beginning with Marbury v. Madison, which we have cited. The courts can and should require him to comply with the congressional mandate."

That is a clear and concise statement that jurisdiction attaches to a similar situation and that the Secretaries can be reached by mandamus. The court should also realize that after the successful victory by Clackamas County in 1954 the Association of O&C Counties and all the intervenors fought Clackamas County for the payment of the reasonable attorney's fees for Clackamas County's special counsel, A. W. Lafferty. See *Lafferty* v. *Humphrey*, 248 F.2d 82. A. W. Lafferty, a former congressman from Oregon (1911-1915) had championed the O&C fight for over fifty years. The Intervenors also fought Clackamas County in that case and lost. Their record in protecting the rights of Oregon is not an enviable one.

The Association of O&C Counties is the motivating force of opposition to Clackamas County. Since they intervened along with the fifteen counties, they should be required to show where the decision to oppose Clackamas County was discussed and debated in open meetings of these various counties. They would be hard pressed to show any type of deliberation.

It is with sadness, not rancor, that these charges must be made about the Association of O&C Counties. The Association has not enlightened the people of Oregon.

Clackamas County has to fight a conspiracy of silence and fear. The "don't rock the boat" philosophy is not very courageous and is founded neither on law nor logic.

CONCLUSION

The Constitution, the Mandamus statute, the legal authorities, all support Clackamas County's contention that the appropriation bills are being wrongfully construed. A grave injustice to Oregon, and the Union as well, will be done if this case is denied a hearing.

Respectfully submitted,

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